NO. 49768-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GROCERY MANUFACTURERS ASSOCIATION,

Appellant.

GROCERY MANUFACTURERS ASSOCIATION,

Appellant,

v.

ROBERT W. FERGUSON, Attorney General of Washington,
in his Official Capacity,

Respondent.

BRIEF OF RESPONDENTS STATE OF WASHINGTON AND ATTORNEY GENERAL FERGUSON

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I. INTRODUCTION

In 2012, members of the Grocery Manufacturers Association (GMA)—such as PepsiCo and Kraft—spent millions to defeat a California measure that would have required labeling of genetically modified foods. When Washington began considering a similar measure in 2013, GMA members again wanted to spend heavily to defeat it. But they had faced criticism for their spending in California, so they wanted to "shield" their identities in Washington. To that end, GMA offered to serve as a front for its members' spending to defeat Washington Initiative 522 (I-522).

GMA's plan largely worked. For months, GMA funneled millions of its members' funds to the No on 522 campaign without publicly disclosing their role. But GMA's plan was eventually exposed, the Attorney General filed this case, and the superior court held that GMA violated state law by: (1) failing to register a political committee and report its activities even as it was receiving contributions from its members to defeat I-522; and (2) concealing the true source of funds it was spending against I-522. GMA now attacks that ruling, portraying itself as an innocent amateur subject to unconstitutionally vague and burdensome laws. GMA's arguments fail.

GMA first claims that summary judgment was inappropriate because of disputed facts about "whether and when GMA became a political committee," GMA Br. at 14, i.e., an entity expecting to make expenditures

or receive contributions to oppose a ballot measure. RCW 42.17A.005(37). In concluding that GMA had become a political committee by February 28, 2013, the superior court relied on GMA's own documents, which showed that by that date GMA clearly expected to receive contributions to oppose I-522 and to shield the true source of those funds. Summary judgment on this issue was proper.

GMA next contends that Washington's campaign finance laws are unconstitutionally vague and burdensome. But courts have repeatedly upheld these laws, and with good reason. They serve vital objectives and provide sufficient notice about what conduct they prohibit. There simply is no constitutional right to hide the true source of campaign contributions.

Finally, GMA claims that its penalty is unconstitutionally excessive. But GMA intentionally engaged in the largest concealment of campaign contributions in state history. GMA did so after being warned that its plan raised legal issues and without "fully, or accurately, disclos[ing] all material facts to its attorneys." This highly culpable conduct justified the penalty imposed.

II. STATEMENT OF THE ISSUES

1. Was summary judgment proper when the undisputed evidence established that GMA solicited, received, and concealed contributions from its members to oppose I-522?

2. Are Washington's political committee laws unconstitutionally vague as applied to GMA when the laws plainly provide *who* must register a political committee and *what* contributions the committee must disclose?

3. Do Washington's disclosure laws satisfy exacting scrutiny as applied to GMA when they impose no burdens on GMA's ability to receive contributions to oppose I-522 and serve an important government interest in informing the public as to who financed opposition to that initiative?

4. Should GMA's civil penalty be upheld when it is well within the superior court's statutory discretion, supported by uncontroverted evidence that GMA intended to conceal its members' contributions from public disclosure, and not grossly disproportionate to the gravity of GMA's concealment and other offenses?

III. STATEMENT OF THE CASE

A. Overview of Washington Campaign Finance Disclosure Law

In 1972, voters declared that it is "the public policy of the state of Washington: (1) That political campaign . . . contributions and expenditures be fully disclosed to the public and . . . (10) That the public's right to know of the financing of political campaigns . . . far outweighs any right that these matters remain secret and private." RCW 42.17A.001. The State's

campaign disclosure laws "seek to ferret out . . . those whose purpose is to influence the political process and subject them to the reporting and disclosure requirements of the act in the interest of public information." *State v. (1972) Dan J. Evans Campaign Comm.*, 86 Wn.2d 503, 508, 546 P.2d 75 (1976). The "requirements do not restrict political speech—they merely ensure that the public receives accurate information about who is doing the speaking." *Voters Educ. Comm. v. Pub. Disclosure Comm'n*, 161 Wn.2d 470, 498, 166 P.3d 1174 (2007) (*VEC*).

The law requires disclosure by "political committees," which it defines as "any person . . . having the expectation of receiving contributions or making expenditures in support of, or opposition to, any candidate or any ballot proposition." RCW 42.17A.005(37). "Person" includes organizations of all sorts, including "association[s]." RCW 42.17A.005(35). "Ballot proposition" includes any "proposition or question submitted to the voters" or any proposed initiative "from and after the time when the proposition has been initially filed with the appropriate election officer of that constituency before its circulation for signatures." RCW 42.17A.005(4); RCW 29A.04.091. Thus, an organization qualifies as a political committee "by either (1) expecting to receive or receiving contributions, or (2) expecting to make or making expenditures" for any initiative from the time of its initial filing for signatures to its final submission to the voters. *State*

ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass'n, 111 Wn. App. 586, 598, 49 P.3d 894 (2002) (*EFF*).

Case law has applied and clarified the political committee definition. Under the first prong, an organization has "the expectation of receiving contributions . . . in support of, or opposition to, any candidate or any ballot proposition," when its members have "actual or constructive knowledge that the organization is setting aside funds to support or oppose a candidate or ballot proposition." *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1020 (9th Cir. 2010) (citing *EFF*, 111 Wn. App. at 602). When an organization is funded primarily by membership dues, one way it can become a "receiver of contributions" is "*if the members are called upon to make payments that are segregated for political purposes and the members know, or reasonably should know, of this political use.*" *EFF*, 111 Wn. App. at 602 (emphasis added). That is, membership payments become "political 'contributions' if the organization's members intend or expect their dues to be used for electoral political activity." *Id.*

Under the second prong, an organization is a political committee if it "mak[es] expenditures in support of, or opposition to, any candidate or ballot proposition," RCW 42.17A.005(37), and "one of its primary purposes is political advocacy." *Human Life*, 624 F.3d at 1020; *see also Utter v. Bldg. Indus. Ass'n of Wash.*, 182 Wn.2d 398, 427, 341 P.3d 953 (2015). The

"primary purpose" limitation "ensures that the electorate has information about groups that make political advocacy a priority, without sweeping into its purview groups that only incidentally engage in such advocacy." *Human Life*, 624 F.3d at 1011.

Once an organization's conduct triggers the definition of political committee, it must register a political committee and publicly report contributions received and expenditures made. The political committee must thereafter file regular reports of contributions and expenditures. RCW 42.17A.235, .240. To ensure that the true source of all contributions and expenditures is transparent to the public, RCW 42.17A.435 prohibits concealment of these transactions. *See State v. Permanent Offense*, 136 Wn. App. 277, 150 P.3d 568 (2006).

B. GMA's Organizational Structure

GMA is a trade association whose members include food and beverage companies and other grocery-related manufacturers. CP 4052 (FF 1).[1] It is governed by a Board of Directors consisting of high-level representatives of GMA's member companies. *Id.* (FF 2-3). GMA receives

[1] The material facts are set forth in the Findings of Fact, Conclusions of Law and Order on Trial. CP 4052-72. GMA did not challenge the superior court's findings after trial, GMA Br. at 1-2, and thus they are verities on appeal. *LK Operating, LLC v. Collection Group, LLC*, 181 Wn.2d 48, 73 n.11, 331 P.3d 1147 (2014). The superior court had also entered findings of fact in granting summary judgment, but those findings are superfluous. *See Chelan County Deputy Sheriffs' Ass'n v. Chelan County*, 109 Wn.2d 282, 294 n.6, 745 P.2d 1 (1987) (findings of fact are superfluous in summary judgment proceedings).

all of its money through its members' general membership dues and special assessments for strategic projects. RP 130:5, 159:1-4.[2]

C. GMA Engages in Electoral Activity

In 2012, California voters rejected an initiative (Prop 37) that would have required labeling of genetically modified or engineered food (GMOs). CP 4053 (FF 9, 12). Opponents of Prop 37 spent $43 million to defeat it, with almost $22 million of that amount coming from GMA and its members. CP 4053 (FF 10-11). Following the California election, some GMA members faced significant criticism for their role in funding the opposition to Prop 37. CP 4053 (FF 13).

In June 2012, Washington I-522, which would have required GMO-labeling, was filed as an initiative to the Legislature. CP 4054 (FF 15). In November 2012, GMA believed there was a "high probability" that I-522 would qualify with the required number of signatures to be presented to the Legislature. Trial Ex. (Ex.) 4; *see also* CP 4054 (FF 14). GMA thus began taking steps to oppose I-522, including organizing a "GMA led coalition" and spending $9,000 to hire a consultant in Washington State. Exs. 4, 7; CP 4054 (FF 20). On January 3, 2013, proponents submitted the required number of signatures for the initiative. CP 4054 (FF 21). After the

[2] RP refers to the Verbatim Report of Proceedings, Volumes 1-6, of the trial that occurred in August 2016.

Legislature took no action on the measure, I-522 appeared on the November 2013 ballot. CP 27, 35.

D. Creation of the "Defense of Brand Strategic Account"

As early as August 2012, GMA's Government Affairs Council, comprised of GMA staff and Executive Board members, began considering options to fight all GMO-labeling efforts, including state initiatives and legislation. CP 4052, 4054 (FF 2, 14). By December 2012, GMA's overall strategy included defeating "the possible Washington state ballot measure" and "developing a plan and budget for fighting it if need be past January." Exs. 4, 6; CP 4054 (FF 19). GMA, however, had an insufficient budget to address the anti-labeling efforts. RP 73:15-25. GMA members also wanted "greater predictability" in funding future opposition to GMO-labeling. RP 80:16-81:10; *see also* Exs. 16, 19. GMA, therefore, needed "to develop a funding methodology that provide[d] significant financial support" to oppose ballot measures and state legislation. CP 4055 (FF 25); Exs. 14, 21.

During the January 19, 2013, GMA Board meeting, GMA staff, including President & CEO Pamela Bailey and former Executive Vice President of Government Affairs Louis Finkel, presented a proposal to the Board for addressing GMO-labeling initiatives nationwide and in Washington. CP 4054-55 (FF 23-24); *see also* Exs. 13-15, 17, 21. As noted in the Executive Committee's meeting minutes:

> To successfully oppose ballot measures and state legislation and advance a long-term plan to manage this issue, Mr. Finkel explained that GMA will need to develop a funding methodology that provides significant financial support. Mr. Finkel described the potential benefits of establishing a multiple use fund for this purpose that will provide greater budgeting certainty to the companies while also shield [*sic*] individual companies from public disclosure and possible criticism . . . . Mr. Finkel then reviewed the status of potential GMO labeling legislation and ballot initiatives in several states.

Ex. 14; *see also* CP 4055 (FF 25). Other Board committee discussions supported "developing a fund of member GMO contributions in advance of forming a state campaign. *By doing so, state GMO related spending will be identified as having come from GMA, which will provide anonymity and eliminate state filing requirements for contributing members*." Ex. 15 (emphasis added); CP 4054-56 (FF 23-24, 27). GMA staff told the Board that they were preparing an effort to defeat I-522 "based upon the disposition of the board." Ex. 17.

Ultimately, the Board directed GMA staff to develop a plan and budget to address these issues. CP 4056 (FF 29); Exs. 16, 17. The Board agreed "engaging in the state of Washington and reviewing long term strategies were necessary." Ex. 16. It directed staff to conduct polling in Washington "to determine the viability of a campaign to defeat I-522," Ex. 2, and to "begin preparations for a campaign . . . to defeat I-522." Ex. 1; CP 4057 (FF 31). The Board also directed staff to develop a two to three-

year budget for the proposed plan. CP 4056 (FF 27); Exs. 17, 21. Specifically, the Board expressed "a preference for GMA to be the funder of such efforts, rather than individual companies." CP 4056 (FF 29); Exs. 1, 17, 21.

GMA staff began implementing the Board's directions concerning GMO-labeling opposition efforts. CP 4056 (FF 30). I-522, the "Washington Ballot Measure," was first on GMA's "to do" items. *Id.*; Ex. 18. GMA intended to initiate polling, develop a coalition, examine possible initial campaign expenditures, and develop a side-by-side of the California and Washington campaigns. Ex. 18. GMA staff also began developing the budget and funding formula to be used in assessing its member contributions to the fund. *See* Exs. 21, 25. GMA staff intended to send the assessment to all Board members and a few non-Board members, but would not assess any GMA Board member who said upfront that they "are not in" for Washington State. Ex. 25. GMA staff determined that, while 2014 and 2015 member contribution numbers were "clearly still estimates," 2013 numbers were fixed, in part, because "[w]e *know* we have a campaign in Washington state." Ex. 26 (emphasis added); *see also* Ex. 27.

On February 18, 2013, GMA staff presented its final plan to GMA's Executive Committee. CP 4057 (FF 32). This proposal included establishing a separate GMA fund that would "allow for greater planning

for the funds to combat current threats and better shield individual companies from attack that provide funding for specific efforts." Ex. 23; *see also* CP 4057 (FF 32, 37). The fund, identified as the "Defense of Brand Strategic Account" (Account), was intended to allow GMA—rather than its member companies—to be identified as the source of funding. *Id*. Of the Account's proposed $17.3 million budget for 2013, GMA staff informed the Executive Committee that $10 million would "fight Washington State Ballot Measure." Ex. 23; CP 4057 (FF 36). GMA also provided a specific timeline for implementing these goals. CP 4057 (FF 36); Ex. 23.

A few days before the GMA Board considered formal approval of the Account, GMA CEO Bailey contacted GMA's outside counsel, William MacLeod. RP 102:16-103:2. MacLeod served as GMA's antitrust and consumer protection counsel, and occasionally sat in on GMA Board meetings for antitrust reasons. CP 4058 (FF 39-40); RP 192:17-22; RP 300:10-14. Bailey informed MacLeod that GMA Board Chair Ken Powell would be asking him at the Board meeting to affirm whether the Account was "legal and appropriate." CP 4058 (FF 38); RP 103:3-16. Bailey did not give MacLeod further instructions or materials to consider, nor did she ask him to research Washington campaign finance laws. *Id.*

Executive VP Finkel followed up with MacLeod. CP 4058 (FF 41). They discussed asking "the members whether or not they would authorize

seeking money" for Account activities and the background of Prop 37. RP 220:15-21. MacLeod did not make any representations to Finkel regarding Washington disclosure obligations, nor did Finkel ask MacLeod to opine on the legality of the Account with respect to Washington's campaign finance laws. CP 4058 (FF 41); RP 220:24-221:24. In fact, Finkel did not find it necessary to ask MacLeod those questions. RP 349:15-350:1. MacLeod ultimately did not research or determine whether the Account would trigger any Washington reporting obligations. CP 4058 (FF 42); RP 211:5-212:3.

On February 28, 2013, the Board approved creation of the Account. CP 4059 (FF 44-45); Ex. 29. During the meeting, Bailey and Finkel described the plans for establishing the fund and the "advantages of the funding mechanism—*a significant one being the ability to identify only GMA as the contributor*." *Id.* (emphasis added). MacLeod endorsed the "legal advantages" of proceeding along those lines, notably identifying GMA as the contributor to the effort and giving GMA flexibility to address emerging needs. *Id.*

> The Board discussed questions about whether the money might be segmented, for example whether funding efforts in Washington could be considered separately. Mr. Powell and Ms. Bailey noted that if the referendum in Washington were to pass, it could make success on other fronts very unlikely to succeed. As a consequence, *Washington was critical to the success of the overall objective*, but the overall objective remained the strategic goal.

Ex. 29. (emphasis added). The Board voted to approve the plan. CP 4059 (FF 44, 45).

At the time of the Account's final approval, GMA and its Board expected and intended the Account to (1) solicit, receive, and hold contributions from specific GMA members; (2) address multiple GMO-opposition strategies; and (3) specifically oppose I-522. CP 4059 (FF 46). GMA intended for the Account to shield the contributions made by GMA members from public scrutiny. CP 4059 (FF 47); *see also* Exs. 17, 23, 29. GMA also intended for the Account to eliminate the requirement and need to disclose GMA member contributions on state campaign finance reports. CP 4059 (FF 48); *see also* Exs. 15, 17, 29.

E. GMA's Implementation of the Account

On March 15, 2013, GMA sent its first Account invoice to certain GMA Board members and non-Board members as planned. CP 4060 (FF 58); Ex. 38. In addition to describing the Account's purpose, Bailey provided recipients with an "Update on Washington State," including GMA's efforts to "assess the viability of a campaign to defeat I-522" and the results of GMA's polling. Ex. 38; *see also* CP 4061 (FF 59). She also promised updates about "our progress on the Washington State efforts." *Id.* The March Account invoice characterized the amount GMA billed its members as a "contribution" to GMA's Account and as the first of two

installments. CP 4061 (FF 60); Ex. 38.

On April 3, 2013, a representative of GMA Board member Kraft Foods contacted Finkel with questions about the invoice and the legality of the Account. CP 4062 (FF 68); Ex. 40. Finkel forwarded her on to MacLeod. *Id.* A Kraft Foods attorney then contacted MacLeod wanting assurance "in writing" that the Account would be "used in accordance with relevant state and federal contribution laws." CP 4062 (FF 68); Ex. 44. When that request was relayed to Finkel, he indicated that MacLeod or his firm should "write something up." CP 4062 (FF 71); Ex. 44. Finkel later claimed that he never asked MacLeod to perform any work. CP 4062 (FF 71).

After his firm began looking into the issue, MacLeod verbally relayed to Finkel some concerns regarding GMA's reporting obligations under Washington law. CP 4061-62 (FF 73, 74). MacLeod recommended that GMA contact a Washington lawyer with experience in campaign finance laws. CP 4061-62 (FF 73). Without having ever looked into the issue, Finkel was confident that GMA was doing things correctly. *See* CP 4061 (FF 72); RP 234:6-21. MacLeod ultimately did not provide Finkel with a final written product, nor did Finkel ask for one. CP 4062-63 (FF 7374); RP 243:3-15.

During this same period, GMA hired Karin Moore as General Counsel. RP 459:2-8. Shortly after starting, MacLeod told Moore to "keep

an eye on things in Washington" because it was a "complicated area of the law" and required "attention from the lawyers and experts." CP 4063-64 (FF 77). Moore did not follow-up with him until July when she received MacLeod's invoices. CP 4065 (FF 85). At Moore's request, MacLeod gave her two draft memos that his firm had prepared and which questioned the legality of the Account under Washington law. *Id.*; *see also* Exs. 93, 94. Moore took no further action on the memos. CP 4065 (FF 85).

GMA hired Washington attorney Rob Maguire in April 2013 to give advice to GMA on the legality of the Account structure under Washington law. CP 4063 (FF 75). On May 8, 2013, GMA received an overview of Washington's campaign finance laws for ballot measures from Maguire. CP 4064 (FF 78). The overview included Washington's reporting requirements for political committees, including the requirement that any group expecting to receive contributions or make expenditures to support or oppose any ballot proposition must register as a political committee and disclose the name of any entity contributing more than $25. *Id.*; Ex. 59.

When Finkel asked Maguire for additional advice, Maguire requested details about the following: (1) how the fund was set up and funded; (2) whether contributions were voluntary; (3) documents stating the purpose of the fund; (4) how spending decisions are made; and (5) examples of solicitations memos describing the fund. CP 4064 (FF 79-80); Ex. 69.

Finkel gave Maguire a general description of the Account and his own view of GMA members' understanding of the purpose of the Account. CP 4064 (FF 81); *see also* Ex. 72. Finkel gave only two documents to Maguire: excerpts from Bailey's invoice memo to contributors (but not the invoice) and a version of GMA's proposed bylaw amendment for the Account. *Id.*; *see also* Ex. 70.

Based on the information provided, Maguire advised that the contributions should be reported as coming from GMA, not by individual members. Exs. 72, 80; *see also* CP 4064-65 (FF 82). But Maguire noted:

> If we were to get into a fight about it, the [Public Disclosure Commission] would push for more information to test whether the strategic fund is a sham, though. If GMA wants a detailed look at the issue, we could dive into those questions. For example, the memo indicates GMA's board approved spending plans before strategic fund invoices were sent to members. Did the board's spending plan have a specific amount budgeted for Washington? If so, how does that compare to the overall funds collected for the strategic fund and was the Washington amount communicated to all members contributing to the strategic fund? Did the invoices to members indicate a set amount for Washington or is there some other context making it plain to members how much of a contribution to the strategic fund would end up in Washington? Are assessments mandatory (essentially dues) or voluntary?

Ex. 72. Finkel provided no additional information to Maguire for him to resolve these questions or revise his memorandum opinion. CP 4064-65 (FF 82); Ex. 80. When she became aware of the memo, Moore also saw no

need to provide Maguire with additional information. RP 476:24-477:6.

On August 12, 2013, GMA sent its second invoice to the same GMA members and nonmembers, again labeling it as a "contribution" to the Account. CP 4066 (FF 86); Ex. 99. While most of the invoice recipients paid GMA's special assessment, some did not pay at all and some restricted use of their funds. Ex. 122. When Kraft Foods remitted its payment, it told GMA that "this contribution is unrestricted, *except that none of the funds may be expended in connection with the 'No on 522' campaign in Washington State*." Ex. 101 (emphasis added); CP 4066 (FF 87).

F. GMA Contributes to the No On 522 Committee

GMA regularly updated the Board on the No on 522 campaign. CP 4061 (FF 63); *see also* Ex. 49. In late April 2013, GMA anticipated making its first contribution to No on 522. Ex. 74. GMA provided its members with initial press response protocols and promised that they would be notified when the funding would occur. *Id.*; *see also* CP 4061 (FF 64). A few weeks later, on May 7, 2013, GMA notified its members of the contribution, reminding them "GMA will be the disclosed funder." Ex. 55. The next day, GMA submitted its first contribution of $472,500 to the No on 522 committee. Ex. 76; CP 4063 (FF 76).

Shortly before the No on 522 committee publicly reported GMA's contribution, GMA provided Board members with "media guidance"

regarding the campaign, saying:

> The Washington campaign finance situation differs significantly from that in California during the "No on Prop 37" campaign. *Virtually all of the financial support for "No on I-522" will come from GMA, not individual companies, and under Washington State law, the campaign will not have to report GMA's members on campaign finance reports or in any campaign advertising*.

Ex. 74 (emphasis added); *see also* CP 4061 (FF 65). Regarding possible questions on GMA member companies' "position on the ballot initiative" or their "financial support," GMA suggested the following response:

> Q: Is your company providing funding to the "No on I-522" campaign in Washington State?
>
> A: No. Company X is a member of the Grocery Manufacturers Association and supports the work the association does on product safety, health and wellbeing, sustainability and a host of other issues. We support GMA, its position on genetically modified ingredients and the association's opposition to I-522 in Washington State. GMA's views and financial support for the "No on I-522" campaign reflect the views of most food and beverage manufacturers in the United States.

Ex. 74. GMA also removed its membership list from its website. CP 4065 (FF 84). Both of these actions were to divert attention from the true source of the funds, namely, the individual GMA members. CP 4061 (FF 65-66); *see also* Ex. 67 (rejecting a statement that GMA "uses the funds at our discretion" because it "*will lead the press and or NGO groups right where we don't want them to go—meaning, 'are you assessing you [sic] members, or do you have a "secret" fund of some kind'*") (emphasis added).

By December 2013, GMA had collected $14,283,140 in contributions from its members to the Account. CP 4066 (FF 88); Ex. 122. GMA contributed a total of $11,000,000 of those Account funds to the No on 522 committee, equating to 77 percent of the Account's total funds for 2013. CP 4066 (FF 89); Ex. 122; *see also* Exs. 104, 119-20.

G. Procedural History

On October 16, 2013, the State sued GMA for failing to timely register and properly report a political committee, as well as concealing the source of the funds it used to contribute to No on 522. CP 18-24. GMA filed counterclaims and a countersuit, alleging a First Amendment defense to its failure to comply with the law. CP 34-47, 4100-10.

Both parties moved for summary judgment. CP 3335-36. The superior court agreed with the State that the undisputed facts established that GMA had committed multiple violations of Washington's campaign finance laws, including the prohibition against concealing the true source of any contributions received. CP 3339; *see also* CP 3187-95. The superior court denied GMA's motion, concluding that GMA failed to show that the campaign finance laws at issue were unconstitutionally vague as applied to it. CP 3339. The superior court, however, reserved for trial the question of the appropriate penalty amount and whether GMA intentionally violated RCW 42.17A. *Id.*

After a five-day trial, the superior court entered 109 findings of facts and reiterated its conclusions of law that GMA:

> (1) solicited and received campaign contributions from its members to oppose I-522;
>
> (2) formed a political committee as a receiver of contributions on February 28, 2013;
>
> (3) failed to timely register and report required political committee activities, including disclosing contributions received and expenditures made; and
>
> (4) concealed the true sources of the contributions received and expenditures made in opposing I-522.

See CP 4070-71. The superior court also concluded that GMA intentionally violated Washington campaign finance laws. CP 4072. The superior court found GMA had never "fully, or accurately, disclosed all material facts to its attorneys." CP 4068 (FF 102). The superior court also found GMA staff's testimony regarding the intent and purpose of the Account and their belief that the Account conformed with Washington campaign finance law to be "not credible." *See*, *e.g.*, CP 4057 (FF 33-35), 4559 (FF 50), 4062 (FF 71), 4068-69 (FF 103-05).

After considering mitigating and aggravating factors, CP 4069, the superior court ordered GMA to pay a $6 million civil penalty for GMA's multiple violations of Washington law, and ordered that the amount be trebled for GMA's intentional violations. CP 4072.

GMA timely appealed the amended final judgment. CP 4361-62.

IV. ARGUMENT

A. Standard of Review

Appellate courts use the same inquiry as trial courts when reviewing orders on summary judgment. *Chelan County Deputy Sheriffs' Ass'n v. Chelan County*, 109 Wn.2d 282, 294, 745 P.2d 1 (1987). Summary judgment is appropriate if there are no genuine issues as to material facts and the moving party is entitled to judgment as a matter of law. *Id.* A material fact is one that affects the outcome of the litigation. *Greater Harbor 2000 v. City of Seattle*, 132 Wn.2d 267, 279, 937 P.2d 1082 (1997). All reasonable inferences are drawn in favor of the nonmoving party. *Landstar Inway, Inc. v. Samrow*, 181 Wn. App. 109, 132, 325 P.3d 327 (2014). However, where the nonmoving party asks the court to draw an unreasonable inference, the inference will not create a material issue of fact. *Id.* Summary judgment may be affirmed on any grounds supported by the record. *Ofuasia v. Smurr*, 198 Wn. App. 133, 141, 392 P.3d 1148 (2017).

While findings of fact on summary judgment are superfluous, *Chelan County Deputy Sheriffs' Ass'n*, 109 Wn.2d at 294 n.6, there is a presumption in favor of findings after a trial. *Fisher Prop., Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 369, 798 P.2d 799 (1990). Moreover, appellate courts defer to the trial court's determinations on weight and credibility of the evidence. *Mueller v. Wells*, 185 Wn.2d 1, 9, 367 P.3d 580

(2016). Credibility determinations regarding witnesses are not reviewable. *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125 (2003). Here, GMA did not challenge any of the superior court's post-trial findings of fact. GMA Br. 1-2. The findings are thus verities. *LK Operating, LLC v. Collection Grp., LLC*, 181 Wn.2d 48, 73 n.11, 331 P.3d 1147 (2014). The only question for this Court is whether the unchallenged facts support the trial court's conclusions of law. *Mueller*, 185 Wn.2d at 9.

GMA's as-applied constitutional challenges to Washington's campaign finance laws are reviewed de novo. *See City of Seattle v. Evans*, 184 Wn.2d 856, 909, 366 P.3d 906 (2015). This Court must "presume [the] statutes are constitutional and place the burden to show unconstitutionality . . . on the challenger." *Id.* (alteration in original) (internal quotation marks omitted). Application of the campaign finance statutes to GMA's specific actions must be found to be unconstitutional "beyond a reasonable doubt." *See State v. Hunley*, 175 Wn.2d 901, 908, 287 P.3d 584 (2012).

Finally, the court reviews the superior court's assessment of civil penalties within the statutory limits for abuse of discretion. *State v. The Mandatory Poster Agency, Inc.*, No. 74978-1-I, 2017 WL 2839781, at *7 (Wash. Ct. App. July 3, 2017). GMA's constitutional claim as to the penalty is considered de novo. *Cooper Indus., Inc. v. Leatherman Tool Grp.*, 532 U.S. 424, 121 S. Ct 1678, 149 L. Ed. 2d 647 (2001).

B. The Undisputed Facts Establish That GMA Violated Washington's Campaign Finance Laws

The material facts lead to but one conclusion: GMA violated Washington law when it failed to register a political committee and report its activities and concealed the identity of the true source of political contributions to oppose I-522. GMA nevertheless asserts that summary judgment was improper due to allegedly disputed facts involving GMA's expectations as to the Account. GMA Br. at 15. GMA's "disputed facts" are inaccurate or immaterial.

The superior court found that the undisputed facts established that GMA should have registered a political committee by February 28, 2013. CP 3191. That finding is proper if, by that point, GMA expected to receive contributions to support or oppose a ballot measure. *Utter*, 182 Wn.2d at 413; RCW 42.17A.005(37). Here, the uncontroverted evidence shows that by the time the GMA Board approved the Account on February 28, GMA expected to receive contributions from its members to oppose I-522. Specifically, GMA had: (1) "agreed that engaging in the State of Washington . . . [was] necessary," Ex. 17[3]; (2) reviewed and approved a budget for the Account that allocated $10 million to "Fight Washington

[3] For ease of reference, the State has cited to the trial exhibits instead of the documents attached to the summary judgment briefing found at CP 855-1312 and 1746-2203. The cited documents are the same for both.

State Ballot Measure," Ex. 23[4]; (3) agreed that the Account "would be segregated from GMA's general operating funds" and designed so that "GMA [would become] the 'funder' of [campaign related] efforts, rather than individual companies," *id.*; (4) considered a "Timeline for 2013" that included extensive campaign activity in Washington, *id.*; and (5) decided that success in Washington was critical to the success of the overall objective. Ex. 29. The superior court correctly found no dispute as to these material facts and granted judgment to the State.

Unable to dispute any of these facts, GMA instead misrepresents the superior court's ruling and then attacks it as incorrect. For example, GMA challenges the superior court's purported finding on summary judgment that "[a] primary purpose of the Account was to shield GMA's members from public scrutiny." GMA Br. at 15 (citing CP 3337 (FF 12, 14, 15)). But the superior court never used the phrase "primary purpose" to describe GMA's intent to shield, and even if it had, GMA's own documents showed that GMA repeatedly described a key purpose of the Account as being to "shield individual companies from public disclosure and possible criticism." Ex. 14; *see also* Ex. 15, 17, 21, 23, 29. More fundamentally, whether GMA's

[4] GMA claims that the budget documents were mere placeholders approximating what costs would be. GMA Br. at 18 n.7. However, GMA never altered the amount dedicated to defeat I-522, and in fact spent more of its members' contributed funds than projected. *See* CP 4057 (FF 36), 4066 (FF 88-89).

goal of shielding its members was a "primary" purpose of its conduct or simply a purpose is irrelevant to the legal question at issue: whether GMA expected to receive contributions to oppose I-522. *Utter*, 182 Wn.2d at 413; RCW 42.17A.005(37).

Similarly irrelevant and misleading is GMA's claim that the superior court found that "GMA first considered the Account after the California campaign ended in November 2012." GMA Br. at 15 (citing CP 3337 (FF 9)). The finding actually states that, after the California campaign, the GMA Board discussed "proposed strategies to defeat similar initiatives in states across the country and at the national level," and that "the discussions included a focus on a possible initiative in Washington State." *See* CP 3337 (FF 9). All of which is true. *See, e.g.*, Exs. 12-16. In any event, the court found that GMA violated the law not based on when it first "considered" the Account, but by failing to register a political committee by February 28, 2013. *Utter*, 182 Wn.2d at 413.

GMA also cites a number of cases for the proposition that "[q]uestions of mental state should not be resolved on summary judgment." GMA Br. at 15. Those cases are inapt. In each case, the relevant question for the court on summary judgment was whether the party "knew" they were violating the law. *See Ofuasia*, 198 Wn. App. at 146-49 (trespass claim required proof that party "knew" the actions were "without lawful

authority"); *Sjogren v. Props. of Pac. Nw.*, 118 Wn. App. 144, 149, 75 P.3d 592 (2003) (issue of material fact whether tenant "knowingly" exposed herself to obvious danger); *Wood v. Battle Ground Sch. Dist.*, 107 Wn. App. 550, 566, 27 P.3d 1208 (2001) (penalty turns on whether member attended a meeting "knowing" that it was in violation of OPMA). Based on the particular facts of each case, the court of appeals determined that summary judgment was improper because of unresolved questions as to the party's mental state. *Id.*

In contrast, the question of whether GMA's activities triggered political committee reporting obligations under Washington law does not turn on whether GMA intended to form a political committee. Instead, the proper question is whether GMA expected to, or did, receive contributions to support or oppose a ballot measure. *Utter*, 182 Wn.2d at 413; RCW 42.17A.005(37). As detailed above, the undisputed facts establish that the answer is yes.

In short, the superior court correctly found no dispute as to the material facts and granted judgment to the State. GMA's challenge fails.

C. The State's Disclosure Laws Are Not Vague and Apply to GMA Just Like Any Other Organization

Washington's campaign finance statutes are not unconstitutionally vague as applied to GMA. "[A] law is unconstitutionally vague if it fails to

provide a reasonable opportunity to know what conduct is prohibited, or is so indefinite as to allow arbitrary and discriminatory enforcement." *Human Life*, 624 F.3d at 1021; *see also City of Spokane v. Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990); *VEC*, 161 Wn.2d at 484 (to be void for vagueness, law must be "framed in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application"). The constitution does not, however, require perfect clarity, even when a law regulates speech. *Human Life*, 624 F.3d at 1021. Notwithstanding that a statute's "standards are undoubtedly flexible, and the officials implementing them will exercise considerable discretion, perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism*, 491 U.S. 781, 794, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989). "If persons of ordinary intelligence can understand what the [law] proscribes, notwithstanding some possible areas of disagreement, the [law] is sufficiently definite." *City of Spokane*, 115 Wn.2d at 179.

GMA argues that the definition of "political committee," RCW42.17A.005(37), and the concealment statute, RCW 42.17A.435, are so vague that it was "impossible for GMA to know" whether the funds in the Account would be treated as GMA's own money or its members' for purposes of opposing I-522. GMA Br. at 19. Yet if GMA had bothered to

inquire into Washington's laws, it would have understood that the laws plainly say that an entity that expects to receive or, in fact, does receive, political contributions from others to oppose a ballot measure cannot hide receipt of such funds or pass them off as if they were its own. This Court—like other state and federal courts before it—should uphold the State's disclosure laws as "not unconstitutionally vague." *VEC*, 161 Wn.2d at 484; *see also Human Life*, 624 F.3d at 1021.

1. Those Expecting to Receive Political Contributions Have Fair Notice of Political Committee Status

GMA challenges the "expectation" portion of the political committee definition based on its application in other cases, GMA Br. at 20-24, but GMA must show that the law is unconstitutionally vague as to its own conduct. *See Haley v. Med. Disciplinary Bd.*, 117 Wn.2d 720, 740, 818 P.2d 1062 (1991) ("one to whose conduct a statute clearly applies may not challenge it on the grounds that it is vague as applied to the conduct of others"). State law provides that those with "the expectation of receiving contributions" to oppose a ballot measure must report to the public as a political committee. RCW 42.17A.005(37). This law plainly applied to GMA's conduct here—by February 28, 2013, GMA expected to receive contributions from its members to oppose I-522.

As previously described, an organization has "the expectation of

receiving contributions" when its members have "actual or constructive knowledge that the organization is setting aside [the members'] funds to support or oppose a candidate or ballot proposition." *Human Life*, 624 F.3d at 1020; *Utter*, 182 Wn.2d at 416-17. Courts have cited a number of examples of the type of conduct that can create an expectation under this test. These include if the organization: (1) solicits contributions for a political purpose; (2) segregates funds for political purposes; (3) has organizational documents that indicate that it expects to receive political contributions and it has taken steps to implement that expectation; or (4) self-identifies to the PDC as a political committee. *See Human Life of Wash., Inc. v. Brumsickle*, No. C08-0590-JCC, 2009 WL 62144, at *22 (W.D. Wash. Jan. 8, 2009).[5] Conversely, an organization generally will not have an expectation of receiving contributions if the organization's members pay dues into a general fund not segregated in any manner for political expenditures. *EFF*, 111 Wn. App at 603. In that instance, the members "would have had no actual or constructive knowledge that their membership dues would be used for electoral political activity." *Id.*

A person of reasonable intelligence would conclude that GMA qualified as a political committee under these laws. Nevertheless, GMA

[5] The State relies on this unpublished federal district court opinion per GR 14.1(b) and FRAP 32.1. A copy of the opinion is attached as required under GR 14.1.

claims that an "expectation" requires "contemporaneous near-certainty" that the money "will be" used for specific electoral activity. GMA Br. at 20-21. Thus, according to GMA, it could not have an expectation of receiving political contributions if the Account funds were not earmarked specifically for Washington. *Id.* Courts, however, have never required certainty as to the intended use of the funds, or earmarking, to establish an expectation of receiving contributions. *See Utter*, 182 Wn.2d at 416-17 ("ultimate disposition of the funds does not answer the contribution question; the expectation is what matters"); *see also Human Life*, 2009 WL 62144, at *21 (nothing suggests that states may only regulate "earmarked" contributions). Instead, the appropriate inquiry is what the organization *did* to provide contributing members "actual or constructive knowledge" that the organization was soliciting the funds to support or oppose a ballot measure. *See Utter*, 182 Wn.2d at 416-17; *EFF*, 111 Wn. App. at 602-03; *Human Life*, 2009 WL 62144, at *21 (organization must have taken "some step" to provide members with requisite knowledge). Given GMA's many communications to its members about its intent to use their payments for a campaign in Washington, GMA certainly had "a reasonable opportunity to know" it had an "expectation" of receiving political contributions. GMA's argument fails.

2. GMA Engaged in Political Advocacy When it Solicited Contributions to Oppose I-522

GMA next asks this Court to engraft a "primary purpose" test onto the contributions prong of the State's definition of political committee. GMA Br. at 26, 33-34. Acknowledging that this has never been done, GMA nonetheless contends it "should be," but provides no constitutional reason for doing so. GMA Br. at 26. There is none.

An organization can qualify as a political committee in two ways: "by either (1) expecting to receive or receiving contributions, or (2) expecting to make or making expenditures" for any initiative. *EFF*, 111 Wn. App. at 598; RCW 42.17A.005(37). Courts have held that the second prong is satisfied only if attempting to influence elections is a "primary purpose" of the organization. *See Utter*, 182 Wn.2d at 427. As courts have explained, the "primary purpose" test is necessary for the "maker of expenditures prong" because it captures those groups that make political advocacy a priority without sweeping in those who only incidentally engage in such advocacy. *Human Life*, 624 F.3d at 1011. This same First Amendment concern does not apply to a "receiver of contributions"—an organization that solicits and receives political contributions from others to oppose a Washington ballot measure *is* making political advocacy a priority. *See Buckley v. Valeo*, 424 U.S. 1, 65-66, 96 S. Ct. 612, 46 L. Ed.

2d 659 (1976) (pooling money through contributions is "essential" advocacy); *Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290, 298, 102 S. Ct. 434, 70 L. Ed. 2d 492 (1981) (*CARC*) (contributions to support a committee advocating for or against a ballot measure "is beyond question a very significant form of political expression"). Courts have already upheld the State's contribution prong with its "actual or constructive knowledge" test as providing sufficient "concrete, discernible criteria" to satisfy the constitution. *Human Life*, 624 F.3d at 1021. This Court should too.

3. GMA Concealed the True Sources of Funding for Opposition to I-522

GMA also challenges as vague the State's prohibition against concealment, RCW 42.17A.435, which provides:

> No contribution shall be made and no expenditure shall be incurred, directly or indirectly, in a fictitious name, anonymously, or by one person through an agent, relative, or other person in such a manner as to conceal the identity of the source of the contribution or in any other manner so as to effect concealment.[6]

As GMA rightly points out, this statute creates an independent violation separate and apart from failing to timely register a political committee under

[6] GMA claims that a blanket prohibition on anonymous contributions would be unconstitutional. GMA Br. at 27 n.10. This statement ignores the United States Supreme Court's conclusion to the contrary. *See CARC*, 454 U.S. at 299-300 ("The integrity of the political system will be adequately protected if contributors are identified in a public filing revealing the amounts contributed; if it is thought wise, legislation can outlaw anonymous contributions.").

RCW 42.17A.205. GMA is wrong, however, to contend that the court below found a violation of RCW 42.17A.435 solely because GMA "fail[ed] to register [and report] as a political committee and, thus, not disclosing the members who had given to the Account." GMA Br. at 28.

While the superior court did conclude that GMA failed to register a political committee, CP 4071 (CL 5(a)), it also concluded that GMA intentionally concealed the true sources of the contributions it received and expenditures it made in opposing I-522. *Id.* (CL 5(d)). Specifically, the superior court found that one of the Account's purposes was to "shield" members' contributions from "public scrutiny," and another to "eliminate the requirement and need to publicly disclose GMA's members' contributions" on campaign finance reports. *See* CP 4059 (FF 47-48). The superior court found "not credible" GMA's belief that "shielding GMA's members as the true source of contributions" was legal. CP 4068 (FF 104). And the superior court issued its penalty based on the conclusion that GMA "conceal[ed] the amount accumulated" and "conceal[ed] the source of contributions" in the Account. CP 4072 (Order at 1). In light of the superior court's findings, this Court can reject GMA's unsupported assertion that the superior court misapplied RCW 42.17A.435 to its conduct.

GMA also contends that RCW 42.17A.435's terms are a "matter of subjective judgment" such that it could not have known that it would need

to disclose its members' contributions to the Account. GMA Br. at 30-31. But if GMA had bothered to inquire into Washington's laws, it would have known that RCW 42.17A.435 plainly prohibits concealing the identity of anyone funneling money through another person or entity to support or oppose a ballot measure. *See Permanent Offense*, 136 Wn. App. at 283-84 (affirming purpose of statute); *see also Webster's Third New International Dictionary* 469 (2002) (conceal: "to prevent disclosure or recognition of : avoid revelation of" or "to place out of sight"). The statute also prohibits acting in "any" manner "so as to effect concealment," which includes using a corporate structure to hide campaign finance information from the voting public. *Permanent Offense*, 136 Wn. App. at 289.

In *Permanent Offense*, the defendant created and used a for-profit corporation to hide her political committee's expenditures to an individual consultant. *Id.* at 280-81. The court of appeals affirmed RCW 42.17A.435's application notwithstanding that using a corporate structure to provide services was not itself a violation. *Permanent Offense*, 136 Wn. App. at 289. The court of appeals agreed that it was the defendant's intent to conceal the true recipient of the expenditures and the actions she took to implement the scheme that violated the statute, not the use of a corporate structure as the defendant claimed. *Id.*

Likewise, the concealment issue here was never about GMA's

formation of the Account or the disclosure of GMA's contributions to the No on 522 committee. *See* GMA Br. at 31. Instead, the issue was GMA's intent for the Account to shield the identity of its members and their contributions to the Account to oppose I-522. While GMA may suggest it is unclear whether this conduct would constitute "concealment" under RCW 42.17A.435, a "person of ordinary intelligence" would plainly know otherwise. GMA's claim of vagueness fails.

D. The State's Disclosure Laws Easily Withstand Constitutional Scrutiny

Courts subject disclosure laws such as Washington's to exacting scrutiny. *See, e.g.*, *John Doe 1 v. Reed*, 561 U.S. 186, 195-96, 130 S. Ct. 2811, 177 L. Ed. 2d 493 (2010) (disclosure requirements are subject to exacting scrutiny); *VEC*, 161 Wn.2d at 482 (same); *Family PAC v. McKenna*, 685 F.3d 800, 805-06 (9th Cir. 2012) (same, evaluating this law); *Human Life*, 624 F.3d at 1005 (same). To survive exacting scrutiny, there must be "a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Doe*, 561 U.S. at 186.

Courts have repeatedly held that Washington's disclosure laws pass this test. *See, e.g.*, *Human Life*, 624 F.3d at 1014; *Family PAC*, 685 F.3d at 808-09; *Utter*, 182 Wn.2d at 967; *VEC*, 161 Wn.2d at 482. As the Ninth Circuit has held: "Washington State's political committee disclosure

requirements are not unconstitutionally burdensome relative to the government's informational interest. Rather, they are narrowly tailored such that the required disclosure increases as a political committee more actively engages in campaign spending and as an election nears." *Human Life*, 624 F.3d at 1013. GMA's contrary arguments all fail.

1. Washington Has an Important Governmental Interest in Requiring Political Committees to Disclose Information About Contributors

GMA first contends that requiring it to disclose its members' contributions does not meaningfully enhance voters' ability to evaluate campaign messages. GMA Br. at 21. But courts have already held that the State has a "sufficiently important, if not compelling, governmental interest" in informing the electorate about *who* is financing ballot measure committees. *Human Life*, 624 F.3d at 1005-06; *see also Family PAC*, 685 F.3d at 808 ("The governmental interest in informing the electorate about who is financing ballot measure committees is of great importance."); *Permanent Offense*, 136 Wn. App. at 284 ("The State has a substantial interest in promoting integrity and preventing concealment that could harm the public and mislead voters.").

GMA's claim that voters knew that it, an association of food and beverage companies, contributed to the opposition of I-522 misses the point. *See* GMA Br. at 32. Voters could not know—because GMA hid from

them—which companies financed GMA's efforts. If that information did not matter, why did GMA go to such great lengths to try to hide it? While GMA claims that such facts would have provided only "incremental information" to the voting public, courts have disagreed: "*Knowing which interested parties back or oppose a ballot measure is critical* . . . . At least by knowing who backs or opposes a given initiative, voters will have a pretty good idea of who stands to benefit from the legislation." *Family PAC*, 685 F.3d at 808 (emphasis added) (citations omitted) (internal quotations marks omitted); *see also Human Life*, 624 F.3d at 1007 ("The state's interest in informing the electorate about where political campaign money comes from and how it is spent is only amplified in the ballot initiative context as more and more money is poured into ballot measures nationwide.").

GMA solicited and received contributions from certain member companies to oppose I-522 in order to shield them from attack for providing the funding, and these companies knew that the funds would be used for that purpose. Accordingly, GMA was able to distort the message provided to voters by hiding the identities of the true speakers against I-522. Like courts before it, this Court should reject GMA's claim that neither the voters nor the State have an interest in such information.

2. Washington's Reporting Requirements Impose Minimal Burdens on GMA

Courts have also held that Washington's "disclosure requirements are not unduly onerous, and their timing and particular informational requirements are substantially related to the government's informational interest." *Human Life*, 624 F.3d at 1013. This Court should reject GMA's arguments to the contrary.

GMA contends that the State's public disclosure laws should apply only to "traditional in-state PACs," not national organizations like GMA that sometimes engage in state politics. GMA Br. at 34-35. Under GMA's theory, out-of-state entities could amass significant war chests, enter the State to expend large amounts of money on a campaign, then exit without the public ever knowing who influenced the state election. Allowing such activity would eviscerate the State's policy "to promote *complete disclosure* of *all* information respecting the financing of political campaigns." RCW 42.17A.001 (emphases added). It would also violate the public's "right to know" who is financing elections. *See, e.g.*, *Fritz v. Gorton*, 83 Wn.2d 275, 296, 517 P.2d 911 (1974) (the right to receive information is the fundamental counterpart of the right of free speech); *Permanent Offense*, 136 Wn. App. at 284 (voters need to know "who is doing the talking" about ballot measures). In comparison to these important

informational interests, requiring entities that satisfy the State's political committee definition to disclose all contributions received and expenditures made imposes only "minimal, if any, organizational burdens." *See Human Life*, 624 F.3d at 1014.

While GMA faults the State for requiring it to disclose all the contributed funds in its multi-purpose Account, GMA Br. at 34-35, nothing in state law required GMA to structure its Account as a multi-purpose fund. GMA could have segregated member contributions to oppose I-522 from moneys intended for other purposes. GMA chose instead to comingle all the funds into one Account. GMA cannot attack the disclosure laws as overly burdensome when its own actions created any alleged burden.

GMA also attempts to escape the consequences of its actions by asserting for the first time on appeal that it had a constitutional right to shield its members from public scrutiny. GMA Br. at 35-37. As an initial matter, this Court can disregard GMA's argument since it never asserted such a constitutional theory for escaping liability to the trial court. *See State v. Reano*, 67 Wn.2d 768, 771, 409 P.2d 853 (1966) (court will not review a case on a theory different from that which it presented to the trial court). Even if the Court considers this argument, GMA's claim fails.

To begin with, it is absurd for GMA to claim that it must keep its membership secret while simultaneously claiming that disclosing which

companies contributed to the Account would have made no difference because everyone understands who its members are. *Compare* GMA Br. at 32 *with* 36. Setting that aside, GMA is correct that the Supreme Court has permitted some groups to avoid compelled disclosure upon proof of "a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals." *See Doe*, 561 U.S. at 200 (quoting *Buckley*, 424 U.S. at 74). Courts, however, have approved this exemption from disclosure for only a few select groups, such as minor political parties or the NAACP, and only upon an "uncontroverted showing" of specific incidents of significant governmental or private hostility. *See Buckley*, 424 U.S. at 74; *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 99-100, 103 S. Ct. 416, 74 L. Ed. 2d 250 (1982); *NAACP v. Alabama*, 357 U.S. 449, 462, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958). GMA meets neither criteria.

GMA points to staff testimony that certain members faced threats and boycotts for opposing California's Prop 37 as the sole basis for its claim that it should not have to disclose its members' contributions to oppose I-522. GMA Br. at 36. But GMA's member companies' experience cannot be compared to that of the Socialist Party or the NAACP, groups notoriously subject to discrimination and abuse. Further, mere staff testimony that its members faced negative consequences in the prior election is not the type

of "uncontroverted showing" that the courts have required when allowing anonymity from disclosure requirements. *See, e.g.*, *Buckley*, 424 U.S. at 74 (requiring evidence of "the type of chill and harassment identified in *NAACP v. Alabama*"); *c.f. ProtectMarriage.com v. Bowen*, 830 F. Supp. 2d 914, 933 (E.D. Cal. 2011) (rejecting 58 declarations and anecdotal evidence of reprisal for supporting prior ballot measure as sufficient to meet standard). Even if GMA had timely raised this constitutional theory, it failed to provide sufficient evidence of reprisal to overcome the State's recognized, important interest in requiring disclosure of those financing opposition to ballot measures.

E. The Penalty Imposed Conforms with State Law and the Constitution

The superior court's $18 million civil penalty against GMA was well within statutory limits and based on uncontroverted findings that GMA intended to conceal the true source of funds opposing I-522.[7] The penalty also comports with the constitution because it is not "grossly disproportionate" to the gravity of GMA's offenses. This Court should

[7] GMA also faults the superior court for excluding evidence of its post-enforcement cooperation with the State, contending that admission of such evidence could have resulted in a smaller penalty. GMA Br. at 37-38. As the State pointed out before trial, the proffered evidence was irrelevant to the issue at trial, i.e., whether GMA intentionally violated state law. *See* CP 3199-3201, 3316-17. Nevertheless, while the superior court excluded the evidence as to the issue of intent, the superior court specifically considered GMA's cooperation as a factor that weighed in favor of a smaller penalty. CP 4069 (FF 107). No abuse of discretion occurred.

reject GMA's arguments to the contrary and affirm.

1. The Superior Court Applied State Law to Establish GMA's Penalty

The Legislature authorized multiple options for assessing a penalty against GMA. The superior court had authority to impose *one or more* of the following for GMA's violations:

> (1) a "per violation" penalty of not more than $10,000;
>
> (2) a penalty equal to $10 per day for every day a required report is late; and
>
> (3) a penalty equal to the amount that went undisclosed.

RCW 42.17A.750(1)(c), (d), (f). The Legislature also authorized trebling the *entire judgment*, including costs and attorney fees, if any violations were found to be intentional. RCW 42.17A.765. The State asked the superior court to impose the maximum penalty allowed under these laws, which amounted to $43,868,460 not including the State's then to be determined investigative costs and attorney fees. *See* CP 4000-03 (explaining calculation of amount). The court, however, chose to impose a lesser penalty than allowed. It imposed a penalty of $6 million trebled, for a total of $18 million, plus the State's investigative costs and fees. GMA cannot fault the superior court for setting the penalty in an amount "within the acceptable range," especially when the maximum penalty could have been much higher. *C.f. The Mandatory Poster Agency, Inc.*, 2017 WL 2839781,

at *8-9 (rejecting State's argument for higher penalty when imposed amount was within statutory range).

2. The Superior Court Correctly Trebled GMA's Penalty Because It Intentionally Concealed the True Source of Its Contributions

RCW 42.17A.765(5) provides that courts may treble the judgment "[i]f the violation is found to have been intentional." *Id*. The superior court correctly concluded that this statute requires a determination that the person acted with the purpose of accomplishing an illegal act under RCW 42.17A. CP 3683-84. It does not require, as GMA contends, a finding that the person "intended to violate the law at the precise moment that the person acted." GMA Br. at 39.

The term "intent" has a technical meaning under state law. *See Hanson PLC v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 58 Wn. App. 561, 571, 794 P.2d 66 (1990). "A person acts with intent or intentionally when . . . act[ing] with the object or purpose to accomplish a [particular] result" that constitutes a violation under the law. RCW 9A.08.010(1)(a) (defining "intent" for criminal matters).[8] "Intent is not, however, limited to the consequences which are desired," but also applies to "consequences

[8] *See also, e.g.*, *In re Disciplinary Proceeding Against Vanderveen*, 166 Wn.2d 594, 611, 211 P.3d 1008 (2009) (applying definition for purposes of lawyer disciplinary proceedings); *Bradley v. Am. Smelting & Ref. Co.*, 104 Wn.2d 677, 682-84, 709 P.2d 782 (1985) (applying definition for intentional tort of trespass); *Hanson PLC*, 58 Wn. App. at 571-72 (applying definition in insurance claim action).

[which] are certain, or substantially certain, to result . . . ." *Bradley v. Am. Smelting & Ref. Co.*, 104 Wn.2d 677, 683, 709 P.2d 782 (1985). In other words, the court may infer that the actor intends the natural and probable consequences of his or her actions. *State v. Caliguri*, 99 Wn.2d 501, 506, 664 P.2d 466 (1983).

GMA contends, however, that RCW 42.17A.435 requires not only proof of intent, but also proof that GMA knew its conduct was illegal. GMA Br. at 40-41. In other words, the State had to prove not only that GMA intentionally concealed the true source of its contributions, but also that GMA knew that its conduct was illegal. That is not the law. As explained above, "intent" depends not on how well a person understands state law, but rather on whether he or she "act[ed] with the object or purpose to accomplish a [particular] result" that is illegal. RCW 9A.08.010(1)(a). Indeed, Washington courts have not required "knowledge of wrongdoing" for a violation to be "intentional."[9]

For example, in *Bradley*, the court held that because the defendant

[9] GMA suggests that the supreme court in *State v. Conte*, 159 Wn.2d 797, 154 P.3d 194 (2007), interpreted RCW 42.17A.435 to require a "knowingly mental state." GMA Br. at 40-41 (citing *Conte*, 159 Wn.2d at 811 n.6). The Court said no such thing. The Court's point was simply that the criminal provision in RCW 40.16.030 did not overlap entirely with chapter 42.17A because violations of RCW 42.17A can occur that "would not involve a 'knowingly' mental state." *Conte*, 159 Wn.2d at 811. And while the Court acknowledged in dicta that RCW 42.17A.435 contains a *mens rea* element, *id.* at 811 n.6, the Court never equated "intentional" with "knowingly." *Cf.*, *e.g.*, *State v. Goble*, 131 Wn. App. 194, 203, 126 P.3d 821 (2005) (rejecting jury instruction that conflated intent and knowledge for a particular crime).

knew that its plant was emitting pollutants into the air and that these pollutants were likely to settle back to earth on others' property, the defendant had the requisite intent to commit civil trespass. *Bradley*, 104 Wn.2d at 682, 684. Likewise, in *Vanderveen*, the court found that an attorney's acts of receiving cash payments and failing to record or report them could only be "characterized as nothing other than intentional," such that he had " ' the conscious objective or purpose to accomplish a particular result,' *concealing* the receipt of the cash payments." *In re Disciplinary Proceeding Against Vanderveen*, 166 Wn.2d at 611 (emphasis added). In each of these cases, the court found that the defendant had intent by looking at whether the person acted with the purpose of accomplishing some illegal act, not whether the defendant actually knew it was violating the law.

Contrary to GMA's assertion, the superior court did not impose treble damages on GMA as a punishment for its speech. Rather, the superior court imposed treble damages because the evidence clearly established that GMA acted with the purpose of accomplishing an illegal result: concealing the true source of its contributions to No on 522. CP 4071-72. Indeed, even when presented with questions about the legality of its actions, GMA continued on course. CP 4068 (FF 102). This Court should reject GMA's argument for a different standard for intent than what state law requires.

3. GMA's Civil Penalty Comports with the Constitution

GMA intentionally concealed $14 million in contributions, failed to register as a political committee, and failed to file countless reports. The superior court imposed a total civil penalty of $18 million ($6 million trebled). CP. 4072. GMA contends that this violates the excessive fines limitation in the Eighth Amendment of the United States Constitution and article I, section 14 of the Washington Constitution. GMA's argument fails because the penalty is well within constitutional limits.

"A fine is unconstitutionally excessive if (1) the payment to the government constitutes punishment for an offense, and (2) the payment is grossly disproportionate to the gravity of the defendant's offense." *United States v. Mackby*, 261 F.3d 821, 829 (9th Cir. 2001) (citing *United States v. Bajakajian*, 524 U.S. 321, 327-28, 334, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998)). The State agrees that GMA's penalty is at least in part "punishment for an offense," but GMA's civil liability of $18 million is not grossly disproportionate to its conduct.

To determine whether a penalty is grossly disproportionate, courts consider a number of factors, including (1) the nature and extent of the violation, (2) whether the violation was related to other illegal activities, (3) whether other penalties may be imposed for the violation, and (4) the extent of the harm caused. *See, e.g.*, *United States v. $100,348.00 in U.S.*

Currency, 354 F.3d 1110, 1122 (9th Cir. 2004). A proper consideration of these factors supports affirming GMA's penalty.

As it has throughout this case, GMA continues to minimize its conduct, asserting that its "only offense involved reporting." GMA Br. at 44. GMA fails to acknowledge that its penalty reflects more than just its failure to timely register a political committee, to identify a treasurer and bank account, and to report its contributions received and expenditures made. CP 4071. GMA's penalty also reflects its intentional concealment from Washington voters of the millions of dollars that it received from its members to oppose I-522, as well as the identity of those members. *Id.*

GMA's violations are thus markedly different from those at issue in *Bajakajian*. That case involved a single isolated transaction in which a defendant attempted to leave the country without reporting currency he was carrying, but it was undisputed that the failure to report was not intended to facilitate another substantive offense—the money "was to be used to repay a lawful debt." *Bajakajian*, 524 U.S. at 338-39. In contrast, GMA's violations constitute more than just a reporting violation; they also constitute a fraud upon the public by deceiving them as to the identity of those who stood to benefit from I-522's defeat.

As to the second factor, GMA's failure to report contributions is inextricably tied to its illegal effort to conceal the true source of the funds

contributed. In *Bajakajian*, the defendant's failure to report was not an effort to hide whose money he was carrying; here, GMA's failure to report was precisely "[to] shield individual companies from public disclosure." Ex. 14.

In assessing the third factor, courts look to "other penalties that the Legislature . . . authorized" and the "maximum penalties that could have been imposed." *$100,348.00 in U.S. Currency*, 354 F.3d at 1122; *see also Bajakajian*, 524 U.S. at 336 ("judgments about the appropriate punishment for an offense belong in the first instance to the legislature"). Where a penalty is less than authorized by statute, it is extremely unlikely to violate the Eighth Amendment. *Newell Recycling Co. v. EPA*, 231 F.3d 204, 210 (5th Cir. 2000) ("No matter how excessive (in lay terms) an administrative fine may appear, if the fine does not exceed the limits prescribed by the statute authorizing it, the fine does not violate the Eighth Amendment.").[10] Here, GMA's penalty of $18 million is well below the maximum penalty allowed by the Legislature for GMA's multiple violations. Because GMA's penalty was within the bounds of the punishment set by the Legislature, it does not offend the Eighth Amendment as being "excessive." *Id*.

On the fourth factor, GMA contends that the harm to the State from

[10] *See also Grid Radio v. FCC*, 278 F.3d 1314, 1322 (D.C. Cir. 2002) (statutorily authorized penalty was neither indefinite, unlimited, or excessive in view of violation); *Combat Veterans For Cong. Political Action Comm. v. FEC*, 983 F. Supp. 2d 1, 19 (D.D.C. 2013) (fine in compliance with statutory guidelines does not offend the Excessive Fines Clause).

its violations does not justify its penalty because its contributions to No on 522 were disclosed. GMA Br. at 45. GMA also contends that no evidence exists to suggest that Washington voters were misled about GMA's opposition to I-522. *Id.* at 45-46. These assertions miss the point. Disclosure of GMA's contributions to the No on 522 committee has never been at issue in this case. Instead, it was GMA's *members' contributions* that GMA intentionally hid from the public. GMA prevented Washington voters from knowing the identity of those entities that were spending money to defeat the initiative. GMA's arguments reflect its continual denial of the great importance that the people of Washington place on an open and transparent electoral system—an importance that the courts have repeatedly recognized—and the harm that GMA caused to the public through its deceit. *See, e.g.*, *Human Life*, 624 F.3d at 1007.

GMA also claims that Washington's campaign finance laws are not targeted at entities like it because it did not "use deceit to sway elections or hide contributions." GMA Br. at 46. But the laws target anyone who fails to disclose their contributions or expenditures to support or oppose a ballot measure, not just those who use deceit. In any event, GMA did "use deceit to sway elections or hide contributions." Even as it was using its members' money to defeat I-522, GMA was telling its members to deny providing such funding. *E.g.*, Exs. 67, 74. The people in enacting RCW 42.17A

intended for "campaign . . . contributions and expenditures [to] be fully disclosed to the public" and "secrecy [] to be avoided." RCW 42.17A.001. GMA's conduct blatantly violated these fundamental principles of the State's campaign finance laws.

In sum, GMA's civil penalty is proportional to the gravity of GMA's offenses. The $18 million penalty accurately reflects the egregious nature of GMA's multiple violations, is below the maximum amount authorized by law, and is reasonable in light of the harm that GMA caused the public during the 2013 election. The penalty should be affirmed.

V. CONCLUSION

For all of these reasons, the superior court's order and judgment should be affirmed. The State should also be awarded its reasonable attorney fees and costs at trial and on appeal. RCW 42.17A.765(5); RAP 18.1.

RESPECTFULLY SUBMITTED this 22nd day of August 2017.

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CERTIFICATE OF SERVICE

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STEPHANIE N. LINDEY
Legal Secretary

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United States District Court, W.D. Washington, at Seattle.

HUMAN LIFE OF WASHINGTON, INC., Plaintiff,
v.
Chair Bill BRUMSICKLE, Vice Chair Ken Schellberg, Secretary Dave Seabrook, Jane Noland, and Jim Clements, in their official capacities as officers and members of the Washington State Public Disclosure Commission, Rob McKenna, in his official capacity as Washington Attorney General, and Dan Satterberg, in his official capacity as King County Prosecuting Attorney, Defendants.

No. C08-0590-JCC.
|
Jan. 8, 2009.

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ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

JOHN C. COUGHENOUR, District Judge.

***1** This matter comes before the Court on Plaintiff's Motion for Summary Judgment (Dkt.Nos.66, 67), the State Defendants' Response (Dkt. No. 70), and Plaintiff's Reply (Dkt. No. 78). Having considered the parties' briefing and supporting documentation, the Court has determined that oral argument is unnecessary and hereby finds and rules as follows.

I. BACKGROUND

A. Washington State Disclosure Requirements

In 1972, Washington voters passed Initiative Measure No. 276, which established the state's Public Disclosure Commission ("PDC") and laid the framework for Washington's campaign finance laws. Washington Revised Code § 42.17.010 states the public policy behind the statutory framework, including:

> (1) That political campaign ... contributions and expenditures be fully disclosed to the public and that secrecy is to be avoided.
>
> ....
>
> (10) That the public's right to know of the financing of political campaigns ... far outweighs any right that these matters remain secret and private.

Id. The policy declaration directs that the measure's provisions "be liberally construed to promote complete disclosure of all information respecting the financing of political campaigns ... so as to assure continuing public confidence of fairness of elections ... and so as to assure that the public interest will be fully protected." *Id.*

The state's current statutory framework contains special registration and disclosure requirements for "political committees." A "political committee" is defined as "any person (except a candidate or an individual dealing with his or her own funds or property) having the expectation of receiving contributions or making expenditures in support of, or opposition to, any candidate or any ballot proposition." WASH. REV.CODE § 42.17.020(39). This definition contains two alternative prongs: an organization can qualify based on an expectation of "receiving contributions" or an expectation of "making expenditures." *Evergreen Freedom Found. v. Wash. Educ. Ass'n (EFF)*, 111 Wash.App. 586, 49 P.3d 894, 902-03 (Wash.Ct.App.2002). However, each of these prongs has been substantially narrowed through judicial construction. Washington state courts have held that an organization will only qualify as a "political committee" based on an expectation of *receiving* political *contributions* if its contributors have "actual or constructive knowledge" that their funds will be used for electoral political activity. *See id.* at 905.[1] To qualify as a "political committee" based on an expectation of *making* political *expenditures*, an organization must have as "its primary or one of its primary purposes" to support or oppose political campaigns. *See id.* at 903 (internal quotation omitted).

[1] For example, an organization becomes a "political committee" under this prong if it solicits contributions for a political purpose, if it segregates funds for political purposes, if its organizational documents indicate that it expects to receive political contributions and it has taken steps to implement that expectation, or if it self-identifies to the PDC as a "political committee." (Rippie Decl. ¶ 35 (Dkt. No. 47 at 18).)

If a group qualifies as a "political committee," it must appoint a treasurer and establish a bank account in the state, WASH. REV.CODE § 42.17.050, .060, and must file a "statement of organization" with the PDC disclosing the names of its officers and any related or affiliated committees or persons, the candidate or ballot proposition that the committee is supporting or opposing, and other information regarding the committee's structure, *id.* § 42.17.040. If the committee intends to raise and spend more than $5,000 in a calendar year or if it intends to raise more than $500 from any one contributor (*see* Rippie Decl. ¶ 43 (Dkt No. 47 at 22)), that committee must make regular reports disclosing, among other things, (1) its funds on hand; (2) the value of any contributions received and the names and addresses of the contributors; and (3) the amounts of any expenditures, the recipients of those expenditures, and the intended purpose. WASH. REV.CODE § 42.17.080, 42.17.090.

***2** Groups that do not qualify as "political committees" must still disclose certain political expenditures. Washington Revised Code § 42.17.100 defines an "independent expenditure" as "any expenditure that is made in support of or in opposition to any candidate or ballot proposition" and is not already required to be disclosed under the rules governing political committees. *Id.* § 42.17.100(1). If any entity incurs more than one hundred dollars of "independent expenditures" in a single campaign or makes an independent expenditure whose value cannot reasonably be estimated, the entity must report the values and recipients of the expenditures to the PDC within five days and must thereafter report any additional independent expenditures for the remainder of the campaign in question. *See id.* § 42.17.100(2)-(4).

Washington's statutory framework also contains special requirements for "political advertising," defined to include "any advertising displays, newspaper ads, billboards, signs, brochures, articles, tabloids, flyers, letters, radio or television presentations, or other means of mass communication, used for the purpose of appealing, directly or indirectly, for votes or for financial or other support or opposition in any election campaign." *Id.* § 42.17.020(38). All radio and television political advertising must include its sponsor's name; all written political advertising must include its sponsor's name and address; and all political advertising that constitutes an independent expenditure must explain that it was not authorized by a candidate and, if sponsored by an organization, must identify the organization's top five contributors. *Id.* § 42.17.510; *see also* WASH. ADMIN. CODE § 390-18-010. If political advertising "supporting or opposing a candidate or ballot initiative" is presented to the public within twenty-one days of the election and costs more than one thousand dollars, its sponsor must report the expenditure to the PDC within twenty-four hours of the presentation. *Id.* § 42.17.103.

Finally, Washington Administrative Code § 390-16-206 explains when a "rating, evaluation, endorsement or recommendation for or against a candidate or ballot proposition" must be treated as a reportable expenditure. News media items, features, commentaries, editorials, letters to the editor, and replies thereto, are *not* considered expenditures and need not be reported as such. WASH. ADMIN. CODE § 390-16-206(1), 390-16-313(2)(b), 390-05-290; WASH. REV.CODE § 42.17.020(15)(b)(iv), (21)(c). In all other cases, if and only if an entity makes a "measurable expenditure of funds to communicate" a rating, evaluation, endorsement, or recommendation, the entity must report it as an expenditure according to the general reporting provisions of Washington Revised Code chapter 42.17 outlined above. WASH. ADMIN. CODE § 390-16-206(1).

B. Human Life of Washington and Initiative I-1000

***3** Human Life of Washington ("Plaintiff" or "HLW") is a nonprofit organization incorporated in Washington State. (Compl. ¶ 13 (Dkt. No. 1 at 4).) HLW's "mission is to reestablish throughout our culture, the recognition that all beings of human origin are persons endowed with intrinsic dignity and the inalienable right to life from conception to natural death." (*Id* .) In 1980, HLW created the Human Life Political Action Committee ("HLPAC"), "a political committee connected to Human Life" that would "participate directly in the endorsement of and assistance to, both financially and through campaign involvement, individual candidates running for office." (Krier Decl. Exh. A-1 (Dkt. No. 74 at 6).) HLPAC has, at various times, registered with the PDC as a "political committee," (Parker Decl. ¶ 11 (Dkt. No. 53 at 9:4)), and has filed required disclosure reports with the PDC, (*id.* ¶ 7).

In 1991, Washington voters considered Initiative 119, which would have amended the state constitution to legalize physician-assisted suicide. (Compl. ¶ 18 (Dkt. No. 1 at 5-6).) In that campaign, HLPAC appears to have

made numerous direct expenditures to oppose the Initiative, and HLW itself also made contributions to several other political committees in opposition. (Parker Decl. ¶ 8 (Dkt. No. 53 at 4-5).) The Initiative was ultimately defeated.

In 2008, Washington voters considered a similar ballot initiative, I-1000, which proposed to "permit terminally ill, competent, adult Washington residents medically predicted to die within six months, to request and self-administer lethal medication prescribed by a physician." (Compl. ¶ 20 (Dkt. No. 1 at 6-7).) HLPAC explicitly opposed I-1000. *See* Press Release, Human Life PAC, HL PAC Endorsements (July 2008), *available at* http://humanlife.net/view_reports.htm? rpid=31 (last visited Oct. 24, 2008). The initiative appeared on the November 4, 2008 ballot and was passed.

HLW brought this lawsuit in April 2008, before I-1000 had officially qualified for the ballot, against the five members of the PDC, Washington State's attorney general, and King County's prosecuting attorney. (Compl. 1 (Dkt. No. 1).) In the complaint, HLW alleged that it wished to engage in "issue advocacy" concerning physician-assisted suicide. (*Id.* ¶ 1.) "Because Physician-assisted suicide is now especially in the public awareness and debate [in light of I-1000], people will be particularly receptive to arguments about the physician-assisted suicide issue, making 2008 an important time for HLW to advocate concerning prolife issues." (*Id.* ¶ 21.) Although the timing of HLW's advocacy was meant to coincide with the I-1000 campaign, it allegedly would not explicitly oppose the initiative. (*Id.* ¶¶ 27-29.)

In the complaint, HLW proposed three specific avenues of advocacy that it intended to pursue. (*Id.* ¶¶ 22-25.) First, the complaint attached an "issue-advocacy fundraising letter" that HLW intended to post on its website and mail or e-mail to a list of potential donors. (*Id.* ¶ 22.) The letter provides:

> ***4** The assisted suicide issue just won't go away. But neither will we. We are here to argue the prolife side on your behalf. However, as this grisly issue heats up again in 2008, Human Life of Washington needs your help to pay for some radio ads to educate the public.

(Fundraising Letter at 1 (Dkt. No. 1 at 22).) The letter explicitly references Initiative 119 before stating that "[n]ow, while their minds are focused on the issue, is the opportune time to educate [the people of Washington] on the dangers of assisted suicide-and on the value of every life." (*Id.*) The letter alleges several statistics and anecdotes about Oregon's use of physician-assisted suicide and then states that "The public needs to receive this sort of information as assisted suicide advocates once again offer biased, inaccurate, and rosy depictions of this grisly practice." (*Id.*) Finally, the letter requests that donors send funds to help support HLW's advocacy efforts. (*Id.*)

Second, the complaint describes a "telephone fundraising script" that HLW intended to use to solicit donors over the phone. (Compl. ¶ 23 (Dkt. No. 1 at 7).) After introducing themselves as a representative from HLW, the caller would state:

> Right now we are trying to reach every pro-life household in Washington with an urgent update. As you've probably heard, former Governor Booth Gardner is trying to get an initiative on the ballot this fall that would legalize physician-assisted suicide in the State of Washington. We fear that many Washingtonians do not know the grisly facts about physician-assisted suicide and its devastating effect on the culture of life.
>
> We need your help at this critical time to get the truth out....
>
> ....
>
> We must protect the most vulnerable citizens of our state and we must ensure that patients can trust physicians. Physicians are to be care givers, not life takers. That is why we're pleading for your help.

(Telephone Script (Dkt No. 1 at 24).)

Third, the complaint includes the scripts of four hypothetical radio ads that HLW intended to broadcast. (Compl. ¶ 24 (Dkt. No. 1 at 7).) One of the ads is entitled "Settled," and is a dialogue between a male and a female speaker:

> M: Assisted suicide is back in the news!
>
> F: Didn't we settle that issue?
>
> M: We *rejected* a ballot measure.
>
> F: Has anything changed?
>
> M: We know more about the dangers.
>
> F: Such as?

> M: A new study said one doctor did 23 of the 28 assisted suicides at an Oregon hospice.
>
> F: Sounds like a Kevorkian!
>
> M: And it said one man seemed rushed into it ... then took hours to die after the drugs. Wife left ... couldn't take it ... so depressed that *she* attempted suicide.
>
> F: All reasons *not* to reconsider the issue.
>
> Narrator: Paid for by Human Life of Washington.

(HLW Ads (Dkt. No. 1 at 25) (emphasis in original).) Another ad is entitled "Trust":

> F: Whatever happened to the Hippocratic Oath?
>
> ***5** M: You mean the part that says, "I will neither give a deadly drug to anybody who asked for it, nor will I make a suggestion to this effect?"
>
> F: Exactly. It was a quantum leap in medicine when you knew that you could always trust your doctor. Before that, who knew whether he'd been hired by a family member to hurry up the inheritance?
>
> M: That trust is the foundation of medicine.
>
> F: Assisted suicide removes it ... turns doctors into killers. That's dangerous.
>
> Narrator: Paid for by Human Life of Washington.

(*Id.*)

The specific examples provided in the complaint were not intended to be exclusive; rather, HLW allegedly intended to do "these and substantially-similar fundraising and public communications in support of its Physician-assisted suicide issue advocacy in 2008." (Compl. ¶ 25 (Dkt. No. 1 at 7-8).) The complaint explained that the "substantially similar" fundraising and communications had not yet been created and would vary as the public debate on the issue evolved. (*Id.*)

HLW argues that it has a constitutional right to engage in this sort of "issue advocacy" without submitting to Washington State's disclosure requirements. (*Id.* ¶ 38.) HLW claims to reasonably fear that the PDC would consider HLW to be a "political committee" under Washington Revised Code § 42.17.020(39) if it undertook its proposed actions, or would consider the individual actions themselves to be "independent expenditures" under Washington Revised Code § 42.17.100, "political advertising" under § 42.17.020(38), or "rating[s], evaluation[s], endorsement[s], or recommendation[s] for or against ... a ballot measure" under Washington Administrative Code § 390-16-206. (*Id.* ¶¶ 34-37.) Because any such determinations by the PDC would subject HLW to disclosure requirements under Washington State law and civil penalties for noncompliance, HLW claims that it is chilled from engaging in protected First Amendment activities as a result of the State's campaign finance laws. (*Id.* ¶ 38.)

On April 18, 2008, HLW moved for a preliminary injunction to prohibit enforcement of Washington State's reporting and disclosure requirements, both facially and as applied to Plaintiff and its proposed "issue advocacy." (Dkt. No. 8.) The Court held that HLW had standing to bring its claims (Prelim. Inj. Order at 3-5 (Dkt. No. 59)); however, it ultimately denied the motion, finding that Plaintiff had failed to establish a probable likelihood of success on the merits and that the interests of the State and the public outweighed the potential harm to HLW, (*id.* at 5-9).

HLW now moves for summary judgment, claiming that "[t]here are no material facts in dispute[2] and HLW is entitled to judgment as a matter of law." (Mot. 1 (Dkt. No. 67).)

[2] HLW's motion provides only cursory facts and instead sets forth its factual allegations in a separately-filed Statement of Material Undisputed Facts. (Dkt. No. 68). Defendants argue that the Statement of Material Undisputed Facts should be struck "[b]ecause this pleading is not among those authorized by Fed.R.Civ.P. 7 and Local Rule 7, and because this Court's July 15 Minute Order (Dkt. No. 65) did not allow any overlength briefs." (Response 2 (Dkt. No. 70).) The Court agrees, and hereby STRIKES Plaintiff's Statement of Material Undisputed Facts. However, because the facts contained in this document were, for the most part, all presented in Plaintiff's Verified Complaint, (Reply 1 (Dkt. No. 78) (noting that the Statement of Material Undisputed Facts merely "stat[es] in convenient form the facts from the *Verified Complaint.*")), the Court's summary judgment analysis is unaffected.

II. DISCUSSION

A. Legal Standard

Under Federal Rule of Civil Procedure 56(c), the Court shall grant summary judgment "if the pleadings, the discovery and disclosure materials on file, and any

affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). "In determining whether summary judgment is appropriate, we view the facts in the light most favorable to the non-moving party and draw reasonable inferences in favor of that party." *Scheuring v. Traylor Bros., Inc.*, 476 F.3d 781, 784 (9th Cir.2007).

B. Justiciability

1. Ripeness and Standing

***6** Defendants first argue that "HLW has failed to state facts of sufficient specificity to demonstrate an actual controversy," (Response 12 (Dkt. No. 70)), as required under the constitutional doctrines of ripeness and standing. *See Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir.2000) ("Whether the question is viewed as one of standing or ripeness, the Constitution mandates that prior to our exercise of jurisdiction there exist a constitutional 'case or controversy,' that the issues presented are definite and concrete, not hypothetical or abstract." (internal quotation omitted)). Defendants claim that HLW has not specified with sufficient certainty the advocacy actions that it intended to take. (Response 11-12 (Dkt. No. 70).) They note that the Complaint, after describing specific fundraising and advertising scripts, states only that "HLW intends to do these *and substantially-similar* fundraising and public communications." (Compl. ¶ 25 (Dkt. No. 1 at 7-8) (emphasis added).) They point to deposition testimony by HLW's CEO that the organization was "not tied to those four specific [advertising] scripts." (Kennedy Dep. 92:3-5 (Dkt. No. 71 at 31).) Finally, Defendants note that the text of HLW's proposed radio scripts were prepared "in discussion with attorneys" (*id.* at 101), suggesting that the language was concocted specifically for this legal challenge, (Response 12 (Dkt. No. 70).)

The Court rejected a similar justiciability argument when ruling on HLW's motion for preliminary injunction. (Prelim. Inj. Order 3-5 (Dkt. No. 59).) The Ninth Circuit has recognized that in First Amendment challenges, "the Supreme Court has dispensed with rigid standing requirements." *Cal. Pro-Life Council, Inc. v. Getman (CPLC I)*, 328 F.3d 1088, 1094 (9th Cir.2003). In such a case, "self-censorship" will constitute a "constitutionally sufficient injury," *id.* at 1093, if Plaintiff has established "an actual and well-founded fear" that the challenged statute will be enforced against it, *id.* at 1095. A well-founded fear of prosecution exists whenever the "intended speech arguably falls within the statute's reach." *Id.*

As the Court has already recognized, HLW's proposed actions all "arguably" fall within the reach of the challenged Washington disclosure statutes. (Prelim. Inj. Order 4-5 (Dkt. No. 59).) HLW intended to run advertisements opposing physician-assisted suicide just as Washington voters were debating the legalization of that very conduct; as a result, HLW's actions were at least arguably made "in ... opposition to" the I-1000 ballot initiative. If so, HLW arguably would have qualified as a "political committee" under state law, *see* WASH. REV.CODE § 42.17.020(39) (defining a "political committee" as "any person (except a candidate or an individual dealing with his or her own funds or property) having the expectation of receiving contributions or making expenditures in support of, or opposition to, any candidate or any ballot proposition"), and its intended advertising expenditures might have qualified as "independent expenditures," *see id.* § 42.17.100(1) ("[T]he term 'independent expenditure' means any expenditure that is made in support of or in opposition to any candidate or ballot proposition and is not otherwise required to be reported ...."), or as "political advertising," *see id.* § 42.17.020(38) (" 'Political advertising' includes any advertising ... used for the purpose of appealing, directly or indirectly, for votes or for financial or other support or opposition in any election campaign."). Finally, although more of a stretch, at least one of HLW's proposed advertisements could arguably be considered a "rating, evaluation, endorsement or recommendation" against I-1000 subject to Washington Administrative Code § 390-16-206. (*See, e.g.*, HLW "Settled" Ad (Dkt. No. 1 at 25) (noting that "[a]ssisted suicide is back in the news" after Washington voters previously "*rejected* a ballot measure" and providing several reasons "*not* to reconsider the issue" (emphasis in original)).)

***7** Plaintiff's proposed actions are sufficiently concrete to render the case justiciable. HLW produced (1) a written fundraising letter, (2) a telephone fundraising script, and (3) four broadcast radio scripts. (Compl. ¶ 22-24 (Dkt. No. 1 at 7).) That HLW intended to engage in "these *and* substantially-similar fundraising and public communications" (*id.* ¶ 25 (emphasis added)) did not render the specific proposed actions any less concrete. Similarly, the Court finds the case justiciable, even if HLW was "not tied to those four specific scripts." (Kennedy Dep. 92:3-5 (Dkt. No. 71 at 31).) Plaintiff desired to engage in a broad debate with Washington voters, but self-censored itself out of fear of government regulation. (Compl. ¶¶ 19, 34-37 (Dkt. No. 1).) To establish standing, Plaintiff need not predict every last expressive position that it would have taken in the debate; that would set an impossibly high bar for Plaintiffs, given

the fluid nature of political and philosophical discourse. (*See id.* ¶ 25 ("[I]t is in the nature of issue advocacy that the need to convey information and educate varies as public debate on an issues varies, so ... it is impossible to predict [exactly] what future issue-advocacy might be required ....") (internal quotation omitted).) To raise a justiciable claim, Plaintiff need only provide a "concrete plan" of action that would implicate the government's regulatory scheme. *See CPLC I*, 328 F.3d at 1094. The Complaint maintained that all of HLW's issue advocacy would be "substantially similar" to the specifically proposed actions, and nothing in the record suggests that any of HLW's actions would have materially differed from the scripts it provided. (Compl. ¶ 25 (Dkt. No. 1).) Therefore, the Court finds that HLW's proposed actions constituted a sufficiently "concrete plan" to bless Plaintiff with standing.

Finally, the Court finds it unremarkable that HLW's advertising scripts were drafted in "discussion with attorneys." (Kennedy Dep. 101 (Dkt. No. 71 at 33).) This is a nuanced area of the law, where the state has a well established power to regulate speech, *see Buckley v. Valeo*, 424 U.S. 1, 13, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (per curiam), and where the state's power sometimes turns on fine distinctions in the content of the regulated speech, *see, e.g., FEC v. Furgatch*, 807 F.2d 857, 863-64 (9th Cir.1987). Given the legal ramifications of HLW's proposed phrasing, Plaintiff's discussion with its attorneys in drafting the language of its ads does not raise any suggestion of bad faith.

2. Mootness

Although the November 4, 2008, election has come and gone, HLW's claim is not moot. *See Ala. Right to Life Comm. v. Miles (ARTLC)*, 441 F.3d 773, 779-80 (9th Cir.2006); *CPLC I*, 328 F.3d at 1095 n. 4; *Porter v. Jones*, 319 F.3d 483, 490 (9th Cir.2003). "[E]lection cases often fall within the 'capable of repetition, yet evading review' exception to the mootness doctrine .... " *ARTLC*, 441 F.3d at 779 (internal quotation omitted). That exception applies where "(1) the challenged action was too short in duration to be fully litigated prior to its cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again." *Porter*, 319 F.3d at 489-90. The Ninth Circuit has repeatedly noted that "the inherently brief duration of an election is almost invariably too short to enable full litigation on the merits." *Id.* at 490; *CPLC I*, 328 F.3d at 1095 n. 4 (*quoting Porter*, 319 F.3d at 490); *ARTLC*, 441 F.3d 779 (*quoting CPLC I*, 328 F.3d at 1095 n. 4). Moreover, HLW has asserted its continuing intention to advocate for an "inalienable right to life from conception to natural death" "as it has in the past." (Compl. ¶¶ 1, 13 (Dkt. No. 1).) The Court finds a reasonable expectation that HLW may, at some point, again desire to advocate on the topic of a future Washington State ballot initiative in a manner arguably covered by the State's disclosure requirements. *See ARTLC*, 441 F.3d at 779-80. Therefore, the instant action is not moot.

C. Merits

***8** Political speech is at the core of the First Amendment. A functioning democracy relies on passionate advocacy, and a robust "marketplace of ideas" requires free and open debate concerning issues of political concern. "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution," and hence is afforded "the broadest protection" under the First Amendment. *Buckley*, 424 U.S. at 14.

First Amendment protection, however, is not absolute. *Id.* at 25. The government may regulate protected speech, so long as the restrictions are justified, meaning that they survive judicial scrutiny under the applicable standard of review. "[T]he severity of the burden the election law imposes on the plaintiff's rights dictates the level of scrutiny applied by the court." *Ala. Independence Party v. Alaska*, 545 F.3d 1173, 1177 (9th Cir.2008) (internal quotation omitted). "Severe" burdens on protected speech are reviewed under strict scrutiny-they must be narrowly tailored to serve a compelling state interest. *Id.* Lesser burdens on protected speech have been reviewed under less rigorous scrutiny. *See, e.g., McConnell v. FEC*, 540 U.S. 93, 136, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003) (holding that contribution limits need only satisfy "the lesser demand of being 'closely drawn' to match a 'sufficiently important interest' " (internal quotations omitted)); *Buckley*, 424 U.S. at 64 (subjecting disclosure requirements to "exacting scrutiny," whereby there must exist a "relevant correlation" or "substantial relation" between the governmental interest and the burden imposed). Although courts have often treated these as distinct standards, they are somewhat fluid in practice. Each standard considers the *degree* of burden imposed on the speaker-the more significant the burden, the more compelling the state interest needed to justify that burden. *See, e.g., ARTLC*, 441 F.3d at 791 (applying strict scrutiny to reporting and disclosure requirements, but upholding the provisions in part because the burdens were "not particularly onerous").

Restrictions on speech must also not be unconstitutionally vague. Vagueness challenges can take either of two

forms. First, a statute's phrasing might simply be "so indefinite [that it] fails to clearly mark the boundary between permissible and impermissible speech." *Buckley*, 424 U.S. at 41 (holding that the prohibition on certain expenditures "relative to" a candidate was vague in this manner). These sorts of vagueness challenges are generally limited to criminal statutes, *see id.* at 40-41; Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 Yale L.J. 853, 903-04 (1991) ("Vagueness doctrine, in its most familiar form, holds that criminal prohibitions, at least, may not be enforced when they are so unclear that people of ordinary intelligence would need to guess at whether their conduct was or was not forbidden."), and may be resolved through narrowing constructions, *see, e.g.*, *Buckley*, 424 U.S. at 42 (reading "the phrase 'relative to' a candidate ... to mean 'advocating the election or defeat of ' a candidate"). The second type of vagueness challenge is often described as a subset of the related First Amendment overbreadth doctrine. *See* Fallon, *supra*, at 904; *Kolender v. Lawson*, 461 U.S. 352, 358 n. 8, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983) ("[W]e have traditionally viewed vagueness and overbreadth as logically related and similar doctrines."). Under this theory, a statute is deemed unconstitutional on its face if it "chills" a "substantial amount of legitimate speech." *Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1152 (9th Cir.2001) ("A statute's vagueness exceeds constitutional limits if its deterrent effect on legitimate expression is both real and substantial, and if the statute is not readily subject to a narrowing construction by the state courts." (internal quotation omitted)); *see also Buckley*, 424 U.S. at 42-44 (further narrowing the definition of "advocating the election or defeat of" a candidate to include only *express* advocacy because the broader definition could substantially chill the general discussion of public issues).

***9** HLW challenges Washington's reporting requirements for "political committees," disclosure requirements for "independent expenditures" and "political advertising," and its treatment of "ratings, evaluations, endorsements, and recommendations." The Court considers each of these four challenges in turn.

1. Reporting Requirements for "Political Committees"

HLW focuses its challenge primarily on Washington's requirements for "political committees," which it refers to as "PAC-style" reporting and disclosure. (Mot. 4 (Dkt. No. 67).)[3] Washington requires "political committees" to appoint a treasurer, establish a bank account in the state, and register with the PDC by filing a "statement of organization," which must be updated as material facts change. WASH. REV.CODE § 42.17.040, .050, .060. For many organizations-those that raise and spend less than $5,000 per year and that do not accept more than $500 from any single contributor-these are the only requirements that attach from "political committee" status. (Rippie Decl. ¶ 26 (Dkt. No. 47 at 14) (noting that such organizations qualify for "mini reporting").) All other, more active "political committees" must file regular reports with the PDC to disclose their contributions, expenditures, and funds on hand. WASH. REV.CODE § 42.17.080, .090.

[3] "PAC" stands for "political action committee".

To qualify as a "political committee," an organization must satisfy either of two prongs. First, an organization is a "political committee" if it has an "expectation of *receiving contributions* ... in support of, or opposition to, any candidate or any ballot proposition." WASH. REV.CODE § 42.17.020(39). To qualify under this prong, the organization must have taken some step to give its contributors "actual or constructive knowledge" that donated funds will be used for electoral political activity. *EFF*, 49 P.3d at 905. Second, an organization is a "political committee" if it has "an expectation of ... *making expenditures* in support of, or opposition to, any candidate or any ballot proposition." WASH. REV.CODE § 42 .17.020(39). To qualify under this second prong, the organization must have as "one of its primary purposes" to support or oppose political campaigns. *EFF*, 49 P.3d at 903.

HLW argues that Washington's PAC-style requirements do not survive strict scrutiny and that the state's definition of "political committee" is vague and overbroad.

(a) "Strict Scrutiny" vs. "Exacting Scrutiny"

As an initial matter, the parties disagree as to which standard the Court should employ in considering whether Washington's "political committee" requirements are justified. HLW argues that the imposition of PAC-style requirements must satisfy "strict scrutiny," i.e., it must be "narrowly tailored" to achieve a "compelling" government interest. *FEC v. Wis. Right to Life, Inc. (WRTL)*, --- U.S. ----, ----, 127 S.Ct. 2652, 2664, 168 L.Ed.2d 329 (2007). In contrast, Defendants argue that it need only meet "exacting scrutiny," which requires a "substantial relation ... between the governmental interest and the information required to be disclosed." *ARTLC*, 441 F.3d at 787 (internal quotation omitted).

***10** The Ninth Circuit has recognized that "the Supreme

Court has been less than clear as to the proper level of scrutiny" for PAC-style requirements, *CPLC I*, 328 F.3d at 1101 n. 16; *see also ARTLC*, 441 F.3d at 787 (noting again that the "degree of scrutiny ... is somewhat unclear"); however, it has resolved that ambiguity in favor of strict scrutiny. In *CPLC I*, the Court held that California's PAC-style requirements on ballot-initiative political committees should be subjected to strict scrutiny and remanded to the district court to conduct the analysis in the first instance. 328 F.3d at 1101 n. 16, 1104. Later, in *ARTLC*, another Ninth Circuit panel suggested that *McConnell* might have relaxed the degree of scrutiny since *CPLC I*, but the Court nonetheless "assume[d] without deciding that strict scrutiny applie[d]." 441 F.3d 787-88. Finally, in *Cal. Pro-Life Council, Inc. v. Randolph (CPLC II)*, 507 F.3d 1172 (9th Cir.2007), when the district court's application of strict scrutiny was back to the Ninth Circuit on appeal, the Court explicitly held that strict scrutiny should still apply. *Id.* at 1177-78. In a footnote, the Court noted that it was "bound by the 'law of the case' to apply strict scrutiny," *id.* at 1177 n. 5, but the opinion's text also makes clear that *CPLC I* is still binding precedent. *Id.* at 1178 ("Because ... the *McConnell* decision [did not] call[ ] into question the analysis [of the cases relied upon in *CPLC I*], we are not compelled to abandon the standard adopted in [*CPLC I*] ."). As a result, the Court finds that it is bound by *CPLC I* and *CPLC II* to apply strict scrutiny to Washington's PAC-style requirements.

(b) Strict Scrutiny Applied: Burdens and Interests

Although *CPLC I* and *II* make clear that strict scrutiny should apply to PAC-style requirements, the cases do not explicitly demonstrate how to apply such scrutiny in practice. In *CPLC I*, the Court remanded to the district court to apply strict scrutiny after further development of the factual record. 328 F.3d at 1105, 1107. On remand, however, rather than develop a factual record to support its regulations, the State of California simply argued that it could impose its requirements on CPLC as a matter of law, pointing to federal campaign finance laws that required "all groups organized in corporate form, including non-profit corporations, to channel express campaign advocacy through PACs." *See CPLC II*, 507 F.3d at 1187. On appeal, the Ninth Circuit acknowledged that courts had upheld broad imposition of PAC-style requirements on corporate campaign speech, but noted that each of those cases applied to *candidate elections* and explained that "it is not at all certain that the Supreme Court would apply the same criteria to ballot measure advocacy." *Id.* at 1187-88. Because this was California's sole argument, the Court found that the state had "not satisfied its burden" of demonstrating that its PAC-style requirements were narrowly tailored to its compelling informational interest. *Id.* at 1187. The Court made clear that one cannot "ignore the distinction between candidate and ballot measure elections." *Id.* at 1187. However, in holding California to its failed burden, the Court never actually analyzed whether the state's compelling interest *could* have justified its PAC-style requirements in the ballot initiative context.

***11** The Ninth Circuit did apply strict scrutiny to PAC-style requirements in *ARTLC*. 441 F.3d 773. Unlike *CPLC I* and *CPLC II*, that case did not involve ballot initiatives, but its analysis is informative nonetheless. In *ARTLC*, the Court reviewed reporting and disclosure requirements that applied to certain nonprofit, ideological corporations that wished to influence the outcome of an election. *Id.* at 779. The State of Alaska required these corporations to (1) register with the state's election commission and make regular reports, (2) report all expenditures and contributions, (3) notify contributors and potential contributors that contributions may be used to influence an election, and (4) disclose the source of their expenditures within the relevant communications. *Id.* at 789-91. In applying strict scrutiny, the Court " 'look[ed] to the extent of the burden ... place[d] on individual rights,' " *id.* at 791 (*quoting Buckley*, 424 U.S. at 68), and found that the burdens imposed under Alaska's statute were "not particularly onerous," *id.* In upholding Alaska's PAC-style requirements, the Court emphasized that they did not impose any limits on the organization's ability to solicit funds, nor did they require broad structural changes like the use of "segregated funds" for political activity. *Id.* at 791 (distinguishing Alaska's requirements from those struck down by the Supreme Court in *FEC v. Mass. Citizens for Life (MCFL)*, 479 U.S. 238, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986)).

ARTLC applied to candidate elections, so this Court is sensitive to not apply that holding directly to ballot measures, where the state has somewhat different interests. *See CPLC II*, 507 F.3d at 1188. That said, the *burden* of PAC-style requirements are the same regardless of whether the organization's advocacy relates to a candidate election or a ballot initiative. Therefore, this Court gives great weight to the Ninth Circuit's finding in *ARTLC* that PAC-style requirements are "not particularly onerous." 441 F.3d at 791. Washington's "political committee" requirements are similar to those upheld in *ARTLC* and contain neither of the more severe burdens on solicitation or segregation of funds that the courts flagged in that case. *See id* . The only notable difference between the Washington and Alaska provisions is that Washington also requires "political committees" to (1) designate a treasurer (i.e., someone at the committee who will be

"responsible for ... complying with the disclosure requirements" (Response 15 (Dkt. No. 70))) and (2) maintain an in-state bank account. Defendants convincingly argue that these minor burdens are necessary for enforcement and "nothing more than the basic administrative infrastructure necessary to implement the disclosure requirements." (*Id.* at 18.)

Washington has also significantly narrowed its reporting and disclosure requirements to focus only on the most active political committees. First, to qualify as a political committee under the "maker of expenditures" prong, the organization "must have as its primary or one of the primary purposes to affect, directly or indirectly, governmental decision making by supporting or opposing candidates or ballot propositions." *EFF,* 49 P.3d at 903. To qualify under the "receiver of contributions" prong, an organization must have taken some affirmative step to give its contributors "actual or constructive knowledge that the organization is setting aside funds to support or oppose a candidate or ballot proposition." *Id.* at 904-05.[4] Finally, many of the organizations that technically qualify as "political committees" are exempted from the regular reporting requirements and need only file the initial registration. (Rippie. Decl. ¶ 26 (Dkt. No. 47 at 14).) The full reporting requirements are limited to those committees that expect to raise or spend more than $5000 or receive more than $500 from a single contributor. (*Id.*) By imposing the more burdensome reporting requirements-which are still "not particularly onerous," *ARTLC,* 441 F.3d at 791-only on the most active political committees, the state avoids unduly burdening the smaller or less active organizations that might be more likely to self-censor their speech rather than comply with the state's requirements.

[4] HLW argues that Washington must go further and limit PAC-status to organizations whose *single* major purpose is campaign advocacy (Mot. 10 (Dkt. No. 67)) or who have received contributions that are *explicitly earmarked* for political advocacy (*Id.* at 18.) The Court addresses, and rejects, these arguments in sections II.C.1(d) and II.C.1(e), respectively.

***12** Having determined that Washington's PAC-style requirements impose only relatively minor burdens and focus those burdens on the political committees most able and willing to comply, the Court must consider whether these burdens are justified by compelling state interests. In *Buckley,* the Supreme Court identified three compelling rationales for requiring disclosure of "campaign speech" in candidate elections. "First, disclosure provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate, in order to aid voters in evaluating those who seek federal office." 424 U.S. at 66-67 (internal quotation omitted). "Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity." *Id.* at 67. "Third, and not least significant, recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of ... contribution limitations ...." *Id.* at 67-68. In *ARTLC,* the Ninth Circuit cited these same three interests in upholding Alaska's PAC-style requirements. *See* 441 F.3d at 792 (holding that Alaska's minor registration and reporting burdens were narrowly tailored to the state's interest in " 'providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions.' " (*quoting McConnell,* 540 U.S. at 196)).

In *CPLC I,* the Ninth Circuit noted that *Buckley* 's second and third rationales generally do not apply in ballot initiative elections, where there is little threat of corruption and typically no limit on contributions or expenditures. 328 F.3d at 1105 n. 23 (9th Cir.2003). However, the Court held that the first "informational" interest "appl[ies] just as forcefully, if not more so, for voter-decided ballot measures." *Id.* at 1105. The Court explained:

> "Even more than candidate elections, initiative campaigns have become a money game, where average citizens are subjected to advertising blitzes of distortion and half-truths and are left to figure out for themselves which interest groups pose the greatest threat to their self-interest." David S. Broder, *Democracy Derailed: Initiative Campaigns and the Power of Money* at 18 (2000). Knowing which interested parties back or oppose a ballot measure is critical, especially when one considers that ballot measure language is typically confusing, and the long-term policy ramifications of the ballot measure are often unknown. At least by knowing who backs or opposes a given initiative, voters will have a pretty good idea of who stands to benefit from the legislation.
>
> ....
>
> Voters act as legislators in the ballot-measure context, and interest groups and individuals advocating a measure's defeat or passage act as lobbyists; both groups aim at pressuring the public to pass or defeat legislation. [The voters], as lawmakers, have an interest in knowing who is lobbying for their vote, just as members of Congress may require lobbyists to disclose

who is paying for the lobbyists' services and how much.

***13** *Id.* at 1105-06. The state's interest in informing the electorate about "where political campaign money comes from and how it is spent," *Buckley*, 424 U.S. at 66 (internal quotation omitted), is only amplified in the ballot initiative context as more and more money is poured into ballot measures nationwide. *See CPLC II*, 328 F.3d at 1105; cf. *Lisa Leff, California Gay Marriage Ban a $73 Million Race*, THE MERCURY NEWS, Nov. 3, 2008, *available at* http://www.mercurynews.com/news/ci_10889066 (noting that California's Proposition 8 was "the costliest election this year outside the race for the White House"). The state therefore retains an extremely compelling interest in "following the money" in ballot initiative elections so that the electorate's decision may be an informed one.

Defendants also raise a compelling interest in protecting the *contributors* of funds used to advocate in support of or in opposition to a ballot initiative. (Rippie Decl. ¶ 29 (Dkt. No. 47 at 16).) Those contributors are entitled to verify that their funds were actually used for their intended purpose. (*See id.* (describing a "high profile enforcement case ... where the public's contributions to the ballot measure committee were unlawfully used by an officer for his personal expenses for activities unrelated to the campaign, and those facts had been concealed from the public by the treasurer and the committee").) In this respect, the requirements that Washington imposes on "political committees" serve the same goals as the registration and disclosure requirements that most states impose on charities. (*Id.*) The Supreme Court has "repeatedly recognized the legitimacy of government efforts to enable donors to make informed choices about their charitable contributions." *Illinois v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 623, 123 S.Ct. 1829, 155 L.Ed.2d 793 (2003). The Court has also suggested that reporting and disclosure provisions are among the "more benign and narrowly tailored options" available to address these concerns. *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 800, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988); *see also Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 638, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980) (suggesting that "disclosure of the finances of charitable organizations" could prevent fraud "by informing the public of the ways in which their contributions will be employed"). "In accord with [these cases], ... in almost all of the states and many localities, charities and professional fundraisers must register and file regular reports on activities, particularly fundraising costs." *See Telemarketing Assocs.*, 528 U.S. at 623 (internal quotation omitted) (noting that "[t]hese reports are generally available to the public"). The state's interest in preventing fraudulent misuse of contributed funds appears just as compelling when applied to an organization like HLW as when applied to the charitable organizations discussed in *Telemarketing Associates.*

***14** The Court holds that these two compelling interests-informing the public about the source of political expenditures and protecting contributors from fraudulent misuse of donations-more than justify the general imposition of PAC-style reporting and disclosure requirements on organizations engaged in ballot measure advocacy. However, the Court must still address several aspects of Washington's specific framework that HLW argues are vague or overbroad.

(c) "in support of, or opposition to"

Under Washington's statute, an organization becomes a "political committee" if it expects to receive contributions or make expenditures "in support of, or opposition to, any candidate or any ballot proposition." WASH. REV.CODE. § 42.17.020(39). HLW first argues that the "political committee" definition is unconstitutionally vague because the words "support" and "opposition" are so indefinite that they do not "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). HLW also argues that the provision is unconstitutionally broad because it could be read to include expenditures that do not "expressly" advocate for a ballot initiative, but instead merely advocate as to an underlying "issue." (Mot. 11-17 (Dkt. No. 67).)

As to the ambiguity of the words themselves, there are several features of Washington's framework that partially alleviate any vagueness concerns. First, in addressing this sort of vagueness argument, "[c]lose examination of the specificity of the statutory limitation is required where ... the legislation imposes *criminal* penalties." *Buckley*, 424 U.S. at 40-41 (emphasis added). HLW concedes that, unlike the federal statute at issue in *Buckley*, Washington's PAC-style requirements do *not* carry criminal penalties. (Mot. 12 n. 2 (Dkt. No. 67).) Second, Washington provides various ways to obtain advice or guidance from the PDC: one can call a toll-free phone number, request an informal advisory opinion, request a formal declaratory order, WASH. ADMIN. CODE § 390-12-250, request an interpretative statement, WASH. REV.CODE § 34.05.230(1), or petition for formal rulemaking, WASH. ADMIN. CODE § 390-12-255. (Rippie Decl. ¶ 21-22 (Dkt. No. 47 at 11-12).) In *Buckley*, the Court suggested that the wide availability of advisory opinions would alleviate many vagueness problems;

however, it did not apply in that case "because the vast majority of individuals and groups subject to [the] criminal sanctions ... do not have a right to obtain an advisory opinion from the [FEC]." 424 U.S. at 40 n. 47. In contrast, Washington's framework appears to provide ample opportunity to obtain a pre-enforcement interpretation from the PDC.

Furthermore, HLW's vagueness argument would fail even without these considerations because the Supreme Court has explicitly held that the words "support" and "oppose" are not unconstitutionally vague. In *McConnell*, the Court considered certain limitations on contributions and expenditures for "public communications" that " 'refer[ ] to a clearly identified candidate for Federal office' and 'promote[ ],' 'support[ ],' 'attack[ ],' or 'oppose[ ]' a candidate for that office." 540 U.S. at 162. The Court rejected an argument that these limitations were unconstitutionally vague, holding:

> ***15** The words "promote," "oppose," "attack," and "support" clearly set forth the confines within which potential party speakers must act in order to avoid triggering the provision. These words "provide explicit standards for those who apply them" and "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited."

Id. at 170 n. 64 (*quoting Grayned*, 408 U.S. at 108-09); *see also id.* at 184-85 (rejecting the same vagueness argument for a provision that did not involve party speakers). In light of *McConnell*, this Court holds that the mere use of the terms "support" and "opposition" does not render Washington's definition of "political committee" unconstitutionally vague. *See United States v. Williams*, --- U.S. ----, ----, 128 S.Ct. 1830, 1845, 170 L.Ed.2d 650 (2008) ("[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." (internal quotation omitted)).

HLW's overbreadth argument, however, raises a closer question and requires more extensive analysis. Essentially, Plaintiff argues that "issue advocacy"-political speech that does not expressly advocate the election or defeat of a candidate or ballot initiative-can never be regulated under the First Amendment. (Mot. 14 (Dkt. No. 67).) Under this theory, Washington's definition of "political committee" is unconstitutional because it could be read to include expenditures for communications that do not *expressly* support or oppose the ballot initiative in question.

The distinction between "express advocacy" and "issue advocacy" was first established in *Buckley*. In that case, the Court considered the constitutionality of the Federal Election Campaign Act of 1971 (FECA). *Buckley*, 424 U.S. at 6. In particular, the Court examined provisions that (1) limited individual *contributions* to $1000 for any single candidate per election; (2) limited individual or group *expenditures* "relative to a clearly identified candidate" to $1000 per year; and (3) required *disclosure* and reporting of contributions and expenditures above certain threshold levels. *Id.* at 7. The Court upheld the contribution limits, finding they had only a "limited effect upon First Amendment freedoms" and that these effects were justified by "weighty interests." 424 U.S. at 29. The expenditure ceiling, however, "impose[d] significantly more severe restrictions on protected freedoms," operating as an outright prohibition of speech subject to criminal penalties. *Id.* at 19-20, 23. The Court initially interpreted the indefinite phrase "relative to a candidate" to mean "advocating the election or defeat of a candidate," *id.* at 42 (internal quotation marks omitted); however, this narrowed definition still raised First Amendment concerns. "Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions." *Id.* The only way to determine whether public discussion of these issues advocated for or against the candidate would be to measure either the subjective intent of the speaker or the predicted effect on the listener. *Id.* at 43. Because neither intent nor effect can be measured with any certainty, the expenditure limits could chill speech on a huge range of issues. *Id.* Therefore, to avoid vagueness and overbreadth concerns, the Court further narrowed the definition of "expenditure" to cover only "communications that in *express terms* advocate the election or defeat of a clearly defined candidate." *Id.* at 44 (emphasis added). So narrowed, the Court found the expenditure limits utterly ineffective, since groups and individuals could still advocate for or against a candidate so long as they "eschew[ed] expenditures that [did so] in express terms." *Id.* at 45 ("The exacting interpretation of the statutory language necessary to avoid unconstitutional vagueness thus undermines the limitation's effectiveness ...."). Because the expenditure ceiling did not effectively further the state's interest, it did not survive strict scrutiny. *Id.* at 50. Finally, in order to avoid similar overbreadth concerns, the Court applied this same narrow definition of "expenditure" to the FECA's disclosure requirements, which it upheld. *Id.* at 80.

***16** Since *Buckley*, the distinction between "express advocacy" and "issue advocacy" has proved problematic. In *McConnell*, the Supreme Court considered a challenge to the Bipartisan Campaign Reform Act of 2002 (BCRA), which was passed in part to address the proliferation of "campaign advertising masquerading as issue ads." 540

U.S. at 132 (internal quotation omitted). To address this problem, the BCRA defined an "electioneering communication" as any "broadcast, cable, or satellite communication" that "refers to a clearly identified candidate;" is made within a certain period of time before an election, primary, or convention; and, for regional candidates, is "targeted to the relevant electorate." *Id.* at 189-90. The statute required disclosure of "electioneering communications" and also prohibited corporations and labor unions from financing such communications through their treasury funds. *Id.* at 190. The challengers noted that this definition went far beyond the "express advocacy" approved in *Buckley* and argued that the BCRA's provisions therefore constituted impermissible regulation of issue advocacy. *Id.* The Court rejected the notion that "*Buckley* drew a constitutionally mandated line between express advocacy and so-called issue advocacy," instead characterizing the *Buckley* holding as a matter of statutory, rather than constitutional, interpretation. *Id.* at 190. The Court upheld the disclosure requirements, noting that they "do not prevent anyone from speaking" and serve "an important function in informing the public about various candidates' supporters *before* election day." *Id.* at 201 (emphasis in original) (internal quotation omitted). The Court also upheld the prohibition for corporations and unions, holding that the justifications for restricting such speech extended at least to all speech that was the "functional equivalent of express advocacy," which included for the "vast majority" of issue ads. *Id.* at 206.

Four years later, however, the Supreme Court considered an as-applied challenge to the same BCRA prohibition on corporate and union speech that it had facially upheld in *McConnell*. *WRTL,* 127 S.Ct. at 2659. In the Court's primary opinion, Chief Justice Roberts, joined by Justice Alito, noted that *McConnell* had only explicitly upheld the prohibition for communications that were the "functional equivalent of express advocacy." *Id.* Whereas the Court in *McConnell* appeared to take a broad view of this term, *see McConnell,* 540 U.S. at 126 ("While the distinction between 'issue' and express advocacy seemed neat in theory, the two categories of advertisements proved *functionally identical* in important respects." (emphasis added)); *id.* at 206 (finding that the "vast majority" of issue ads had an "electioneering purpose" and hence were the functional equivalent of express advocacy), the Chief Justice read the term far more narrowly. Expressing the same overbreadth concerns that had troubled the Court in *Buckley,* he held that "an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL,* 127 S.Ct. at 2667. He found that the interests that justified the regulation of campaign speech did not, in that case, justify the regulation of all genuine issue advertising. *Id.* at 2673.

***17** Although *WRTL* suggests a renewed concern for the chilling effect of campaign finance laws on the discussion of public issues, the breadth of its holding remains unclear. *McConnell* limited the definition of "electioneering communication" to the "functional equivalent of express advocacy" only as far as it applied to the *prohibition* on corporate and union speech, 540 U.S. at 206, and apparently not as it applied to the BCRA's *disclosure* requirements, *see id.* at 201 (stating, without reservation, that the BCRA's "disclosure requirements are constitutional"). Because *WRTL* 's as-applied challenge was limited to the BCRA's corporate speech prohibition, it is unclear whether the opinion's logic extends to lesser burdens on non-express advocacy.

More importantly, nothing in *Buckley*, *McConnell*, or *WRTL* suggests that "issue advocacy" is *fundamentally* entitled to greater First Amendment protection than express political advocacy. Indeed, in *Buckley*, the Court repeatedly emphasized that that the protection of campaign speech was at the core of the First Amendment and it merited the same protection as any speech regarding issues of public concern. 424 U.S. at 15 ("[I]t can hardly be doubted that the [First Amendment] guarantee has its fullest and most urgent application precisely to the conduct of campaigns for public office." (internal quotation omitted)); *id.* at 48 ("Advocacy of the election or defeat of candidates ... is no less entitled to protection under the First Amendment than the discussion of political policy ...."). The Supreme Court has protected "issue advocacy" from the federal campaign finance laws not because that speech is sacred, but simply because the rationales proffered for those laws have not justified imposing broad burdens on public discourse. *See WRTL,* 127 S.Ct. at 2673 (finding the BCRA's prohibition on corporate speech unconstitutional as applied because "appellants identify no interest sufficiently compelling to justify burdening WRTL's speech").

Buckley, *McConnell*, and *WRTL* each dealt with federal campaign finance laws that were limited to the election of *candidates*, but *ballot initiative* elections present strikingly different considerations. Indeed, the entire concept of "issue advocacy" takes on a different meaning in ballot measure elections. In candidate elections, "campaign speech" and "issue advocacy" are often difficult to distinguish in practice, but they are at least distinct in theory. *McConnell,* 540 U.S. at 126. In that context, campaign speech is intended to influence the listener to vote for or against a candidate, whereas issue

advocacy is intended simply to influence the voter's opinion on an issue of public concern. The problem, of course, is that the speaker's "intent" is impossible to determine, so pure issue advocacy on any number of issues might be mistaken for campaign speech. *Buckley*, 424 U.S. at 42. Any speaker stating a position on an issue that happens to coincide with a candidate's position could be deemed to be "supporting" the candidate; similarly, any disagreement with a candidate's position could be misinterpreted as "opposition" to the candidate. Therefore, broad regulation of campaign speech in a candidate election could potentially chill vast amounts of issue advocacy on a wide range of public issues-indeed, *any* issue on which *any* candidate has taken a position.

***18** In the ballot initiative context, however, there is little, if any, meaningful distinction between issue and express advocacy. Ballot initiatives present a single *issue* for public referendum. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 790, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978) ("Referenda are held on *issues* ...." (emphasis added)). "Campaign speech," in this context, is speech intended to influence the voter's opinion as to the merits of this single issue-in other words, it is "issue advocacy," plain and simple. When an issue is presented to the public for referendum in this manner, the legitimate state interest in determining and reporting "where [the] money comes from," *Buckley*, 424 U.S. at 66 (internal quotation omitted), extends to all public debate on that issue. For example, I-1000 asks voters to decide *a single, specific issue*-namely, whether Washington should allow physician-assisted suicide. In the lead up to the election, voters are entitled to know who is lobbying to influence their opinion on that issue, and whether the speaker has a vested interest in the outcome of ballot initiative.[5] Similarly, when HLW telephones pro-life households with "an urgent update" informing them of I-1000 and "pleading for [their] help" "at this critical time to get the truth out" about physician-assisted suicide, contributors have an interest in ensuring that HLW actually spends the donated funds on the intended advocacy, whether that advocacy "expressly" mentions I-1000 or not. In short, from the perspective of the state's compelling interests, there is simply no difference between speech that advocates for or against physician-assisted suicide and speech that advocates for or against I-1000.

[5] Ballot initiatives also often concern proposed public works projects, where some private parties are almost certain to have a financial stake in the outcome. For example, consider any of the several ballot initiatives concerning the construction of a citywide monorail in Seattle-several parties (construction firms, owners of homes on the proposed line, etc.) have a financial interest in the outcome of such an election. The voters' compelling interest in "knowing who is lobbying for their vote," *CPLC I*, 328 F.3d at 1106, clearly justifies regulating an organization that publicly advocates passing the initiative, but it likewise justifies regulating an organization advocating for the "general" idea that Seattle should have a citywide monorail. The latter issue is fundamental to the ultimate question being put before the voters and implicates the same governmental interest in tracking and disclosing the sources of public expenditures.

Regulation of ballot initiative campaign speech, defined broadly, will therefore necessarily impose a burden on "issue advocacy"; however, it is a much more targeted and limited burden than that which troubled the Court in *Buckley* and *WRTL*. Broad, ambiguous regulation of campaign speech in a candidate election risks burdening issue advocacy that is only peripherally related to the election. Moreover, it threatens to burden debate on a *broad range* of issues-indeed, any issue that is arguably "pertinent" to the election. *See WRTL*, 127 S.Ct. at 2669. In contrast, regulating campaign speech in a ballot measure election will burden issue advocacy only as to the *single* issue put before the public, and only because such campaign speech and issue advocacy are, both in practice and in theory, one and the same. In that scenario, the disclosure of issue advocacy is not an unfortunate byproduct of the campaign disclosure laws; it is its central and intended purpose.

Accordingly, the Court rejects HLW's contention that there is a bright-line rule prohibiting the regulation of "issue advocacy" and holds that the state's compelling interests in informing the electorate and protecting contributors justify requiring "political committees" to report on and disclose all expenditures made "in support of, or opposition to ... a ballot proposition." This holds even when "expenditure" is defined to include some advocacy as to the "issue" underlying the proposition, as long as such regulations are limited to the specific issue on which the public's vote is being sought.

(d) "one of its primary purposes"

***19** HLW also argues that the state's definition of "political committee" is overbroad because the "maker of expenditures" prong applies to any organization that has as "its 'primary *or one of the primary purposes* to affect, directly or indirectly, governmental decision making by supporting or opposing candidates or ballot propositions.' " *EFF*, 49 P.3d at 903 (emphasis added) (*quoting State v. Dan Evans Campaign Comm.*, 509 P.2d 75, 79

(Wash.1976)). HLW claims that the State can only impose "PAC-style" reporting and disclosure requirements on organizations whose *single* "major purpose" is the election or defeat of candidates or ballot initiatives.

In *Buckley*, the Supreme Court considered the FECA's disclosure requirements as they applied to both "political committees" (who had to "register with the [FEC] and to keep detailed records of both contributions and expenditures") and individuals (who had to disclose contributions or expenditures of over $100 per year, excluding contributions to a candidate or political committee). 424 U.S. at 63-64. The Court raised the same overbreadth concerns that had led it to strike down the FECA's expenditure ceilings, noting that the requirements for "political committees" "could raise similar vagueness problems" because the term "could be interpreted to reach groups engaged purely in issue advocacy." *Id.* at 79. However, the Court noted that several lower courts had construed the FECA "to apply only to committees soliciting contributions or making expenditures the major purpose of which is the nomination or election of candidates." *United States v. Nat'l Comm. for Impeachment*, 469 F.2d 1135, 1141 (2d Cir.1972). The Supreme Court adopted this narrowing construction, noting that "[t]o fulfill the purposes of the Act they need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Buckley*, 424 U.S. at 79. The Court found that the definition, so narrowed, no longer raised overbreadth concerns; however, it never suggested that this was the *only* legitimate narrowing construction that it could have adopted.

Subsequent Supreme Court opinions make clear that there is no "bright line" requirement that PAC-style requirements only be imposed on organizations whose single "major purpose" is campaign advocacy. One line of cases involved a provision in the FECA that prohibited *any* corporation "from using treasury funds to make an expenditure 'in connection with' any federal election .... " *MCFL*, 479 U.S. at 241. To make political expenditures under the statute, a corporation needed to "administer[ ] a segregated political fund," "appoint a treasurer for its segregated fund, keep records for all contributions, file a statement of organization containing information about the fund, and update that statement periodically," *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 657, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990)-in other words, the FECA essentially imposed "PAC-style" requirements on *all* corporations, regardless of their major purposes. In *MCFL*, the Supreme Court considered an as-applied challenge to this provision by a small, nonprofit, ideological corporation, 479 U.S. at 241-42, and noted that the corporation faced "more extensive requirements and more stringent restrictions than it would be if it were not incorporated." *Id.* at 254. The Court suggested that there generally were compelling state interests in regulating the campaign speech of corporations, who received artificial, state-created advantages and whose ability to amass large sums of wealth might lead to an unfair advantage in the political marketplace. *Id.* at 257. However, the Court found that those interests did not apply in this narrow case because MCFL (1) "was formed for the express purpose of promoting political ideas and cannot engage in business activities," (2) "ha[d] no shareholders or other persons affiliated so as to have a claim on its assets or earnings," and (3) "was not established by a business corporation or a labor union, and ... [had a] policy not to accept contributions from such entities." *Id.* at 264 (noting that these "three features [are] essential to our holding"). Later, in *Austin*, the Court reiterated that the *MCFL* exception was narrow and applied only to corporations that "share[ ] these crucial features." 494 U.S. at 662. *Austin* makes perfectly clear that PAC-style requirements (extremely similar to those at issue in this case) may be imposed on non-*MCFL*-like corporations who partake in campaign activity even if it is not their single "major purpose." *See id* .[6]

6 HLW does not claim to fit within the exception set forth in *MCFL*. HLW appears to satisfy the first two elements of the test (*see* Compl. ¶ 13 (Dkt. No. 1) ("HLW is a nonstock, ideological ... corporation ....")); however, the record does not indicate whether HLW "accepts contributions from" "business corporation[s] or labor union[s]," *see MCFL*, 479 U.S. at 264.

***20** The Ninth Circuit has upheld the imposition of PAC-style requirements without regard to a corporation's "major purpose," even when that corporation fits within *MCFL* 's narrow exception. In *ARTLC*, the Court considered an Alaska campaign law that required *MCFL*-type corporations to register and file regular reports with the state's election commission. 441 F.3d at 789-91. The Court upheld these PAC-style requirements, noting that they were "not particularly onerous" and justified by the standard interests in disclosure that the Supreme Court recognized in *Buckley* and *McConnell*. *Id.* at 791-92.[7]

7 HLW suggests that *ARTLC* was incorrectly decided. (*See* Mot. 9 (Dkt. No. 67) (arguing that *ARTLC* "ignores *MCFL*'s lengthy discussion of the organizational and conduct burdens of PAC status").) The Court disagrees, but notes that it would, of course,

be bound to follow *ARTLC* even if it disagreed with the Ninth Circuit's analysis.

HLW claims, somewhat disingenuously, that the Ninth Circuit held in *CPLC II* that "PAC status may not be imposed on 'multi-purpose organizations.' " (Mot. 7 (Dkt. No. 67).) In fact, the Court in that case explicitly *rejected* CPLC's argument that "because its major purpose is not campaign advocacy, it was improper for California to 'treat [CPLC] like a PAC.' " 507 F.3d at 1180 n. 11. The Court cited *ARTLC* for the proposition that "*irrespective of the major purpose of an organization,* disclosure requirements may be imposed" and found "CPLC's argument to the contrary ... unpersuasive." *Id.* (emphasis added).

HLW's only support comes from a nonbinding case from the Fourth Circuit. *N.C. Right to Life, Inc. v. Leake (NCRTL),* 525 F.3d 274 (4th Cir.2008). That case involved North Carolina's campaign finance law, which defined a "political committee" to cover any organization that has "*a* major purpose to support or oppose" a candidate for election. *Id.* at 286 (emphasis added). The majority held that *Buckley* had created a hard-and-fast rule: "an entity must have ' *the* major purpose' of supporting or opposing a candidate to be designated a political committee." *Id* . at 288 (emphasis in original). It found the state statute overbroad, because it would regulate too much "protected speech unrelated to elections." *Id.* at 289. The majority also found the statute unconstitutionally vague, because it did not expressly define when a "purpose" became a "major purpose." *Id.* at 290.

This Court respectfully disagrees with the Fourth Circuit's analysis. Nothing in *Buckley* or *MCFL* suggests a bright-line requirement that PAC-style requirements be reserved for organizations whose single "major purpose" is election-related; indeed, *Austin* specifically upheld similar requirements on a multi-purpose corporation. 494 U.S. at 662. The phrase "*a* major purpose" is no more vague than "*the* major purpose." *See NCRTL,* 525 F.3d at 328 (Michael, J., dissenting). Moreover, the Washington statute in this case creates only civil penalties, and parties can request prior interpretations from the PDC (Rippie Decl. ¶ 21-22 (Dkt. No. 47 at 11-12)), so there is little fear that any remaining ambiguity in the test will chill protected speech.

***21** Finally, there are compelling state justifications for extending PAC-style reporting to multi-purpose organizations. First, *Buckley* 's "*the* major purpose" test "encourages advocacy groups to circumvent the law by *not* creating political action committees and instead to hide their electoral advocacy from view by pulling it into the fold of their larger organizational structure." *NCRTL,* 525 F.3d at 332 (Michael, J., dissenting) (emphasis in original). Second, basing "political committee" status on an organization's single "major purpose" discriminates against small organizations, because advocacy that would constitute a small organization's major purpose might only be considered one of several primary purposes at a larger entity. By considering the *absolute* amount of campaign activity as opposed to the *relative* amount of such activity, the state can fairly treat like political expenditures alike, regardless of their source.

Therefore, the Court holds that Washington's definition of "political committee" is not rendered overbroad simply by including organizations that make supporting or opposing an election "one of [their] primary purposes." The state has a compelling interest in regulating all such organizations rather than simply those whose *single* major purpose is campaign activity. There are advantages and disadvantages to both approaches, and neither is constitutionally required.

(e) "actual or constructive knowledge"

HLW also challenges the "political committee" definition based on its "receiver of contributions" prong, which it likewise claims is overbroad. (Mot. 18 (Dkt. No. 67).) In *Buckley,* the Supreme Court interpreted the FECA's definition of "contribution" to only include funds that were "earmarked for political purposes." 424 U .S. at 23 n. 24. HLW argues that this limiting construction is constitutionally required, and that Washington's definition is overbroad because it applies whenever a contributor *knows or reasonably should know* that the funds will be used for political purposes. *EFF,* 49 P.3d at 905.

Nothing suggests that states may only regulate contributions that are expressly made for political purposes. In *Buckley,* the Supreme Court considered regulations that applied to various transfers of funds made "for the purpose of influencing" a federal election or primary. 424 U.S. at 23. The statute did not define this phrase, so the Court relied on its "general understanding of what constitutes a political contribution," which included all funds provided directly or indirectly to a candidate, political party, or campaign committee, and all funds transferred to another person or organization "earmarked for political purposes." *Id.* at 23 n. 24. Viewed in this light, the Court held that the FECA's definition of "contribution" was not unconstitutionally vague, *see id.* at 23 n. 24, 78; however, it never suggested

that states could *only* regulate "earmarked" political contributions.

***22** In fact, the Ninth Circuit has already rejected HLW's argument. In *CPLC II*, the Court considered California's definition of "contribution," which included any payment made when "the donor *knows or has reason to know* that" the payment will be used to make other political contributions or expenditures. 507 F.3d at 1181 (emphasis in original). CPLC argued that the state could only regulate contributions "expressly made for political purposes," but the Court disagreed. *Id.* at 1183 (internal quotation omitted). The state explained why *Buckley* 's narrow definition was insufficient to further its compelling informational interests: "By simply discouraging donors from earmarking their donations ..., any multi-purpose group could escape classification as a [political committee] and thereby avoid the duty to disclose its contributors ...." *Id.* at 1183 (internal quotation omitted). The Court held that California's definition of contribution was narrowly tailored to support its compelling government interest. *Id.* at 1184.

Likewise, Washington's "receiver of contributions" test does not render its PAC-style requirements overbroad. The state's compelling interest in informing the electorate about the source of political advocacy easily extends to contributions made with the *knowledge* that the contributed funds will be used for political ends. Moreover, a contributor is only deemed to have "constructive knowledge" of an organization's political intentions if that organization has taken some explicit action to make those intentions clear, such as (1) soliciting contributions for political advocacy, (2) segregating funds for political purposes, (3) registering as a "political committee" with the PDC, or (4) indicating in the organization's bylaws that it intends to receive political contributions. (Rippie Decl. ¶ 35 (Dkt. No. 47 at 18).) As a result, Washington's treatment of "contributions" is far less vague than that in the FECA, which turned on the hard-to-discern "purpose" of the contribution. *See Buckley*, 424 U.S. at 23 n. 24. Therefore, by limiting its regulations to contributions made with "actual or constructive knowledge that the organization is setting aside funds to support or oppose a candidate or ballot proposition," *EFF*, 49 P.3d at 904, the state has narrowly tailored its PAC-style requirements while avoiding the ambiguities that the Court was concerned with in *Buckley*. *See CPLC II*, 507 F.3d at 1183 ("The fact that California has more explicitly defined 'contribution' does not weaken its legislation.").

(f) "expectation"

Finally, HLW notes that Washington defines "political committees" based on an "expectation" of receiving contributions or making expenditures, and it argues that the term "expectation" is unconstitutionally vague. (Mot. 17 (Dkt. No. 67) ("Is it a hope?-promise?-understanding?-agreement?-contract?").) The Court agrees that the term is ambiguous and that, without guidance from the state courts, it might be difficult for a person of normal intelligence to know at what point an organization "expected" to receive contributions or make expenditures. However, as has already been made clear, the state courts and agencies have significantly narrowed each of the definition's prongs and, in the process, have stripped the definition of ambiguity.

***23** As described above, to qualify as a "receiver of contributions," an organization must have taken an affirmative step to give potential contributors "actual or constructive knowledge that the organization is setting aside funds to support or oppose a candidate or ballot proposition." *EFF*, 49 P.3d at 904. After any of the specific triggering actions takes place, the organization can "expect" to receive political contributions because its potential contributors will "know or should know" that their contributions will be used for political activity. (Rippie Decl. ¶ 35 (Dkt. No. 47 at 18-19).)

The definition of "political committee" has been similarly narrowed under the "maker of expenditures" prong by requiring that the organization "have as its primary or one of the primary purposes" to support or oppose ballot propositions. *EFF*, 49 P.3d at 903 (internal quotation omitted). Once the organization has made electoral political activity "one of its primary purposes," there is no doubt that it will "expect" to make expenditures in support of that purpose.

These narrowing interpretations of the definition's two prongs impose "political committee" status only after concrete, discernible criteria have been met. In so narrowing the definition, the state courts and agencies have eliminated any ambiguity initially presented by the term "expectation."

(g) Narrow Tailoring

In sum, the Court finds that Washington's PAC-style disclosure and reporting requirements are narrowly tailored to serve the state's compelling interests. Washington's "political committee" requirements are "not particularly onerous." *ARTLC*, 441 F.3d at 791. When Washington voters are asked to vote on an issue of public concern, they are entitled to know who is lobbying to

influence their opinion on that issue. Similarly, when Washington residents contribute funds to an organization claiming to support or oppose a ballot initiative, those contributors are entitled to verify that their funds were used for their intended purpose. *See Riley*, 487 U.S. at 800 (explaining that compelling disclosure of contributions and expenditures is one of the "more benign and narrowly tailored" means to ensure that organizations are appropriately using the public's contributions). The State is justified in extending these disclosure and reporting requirements to organizations that make campaign advocacy "their primary or one of their primary purposes" and to organizations that give their contributors "actual or constructive knowledge" that the donated funds will be used for electoral political activity. Finally, by reserving its reporting requirements for the most active political committees (*see* Rippie Decl. ¶ 26 (Dkt. No. 47 at 14)), the state has narrowly tailored the provisions to avoids unduly chilling the speech of smaller or more reticent political advocates.

Democracy depends on "uninhibited, robust, and wide-open" speech, which cannot occur "when organizations hide themselves from the scrutiny of the voting public." *McConnell*, 540 U.S. at 197 (internal quotation omitted). The requirements that Washington imposes on "political committees" enforce the disclosure necessary to maintain a well-functioning political process, and no more. Therefore, the PAC-style requirements survive strict scrutiny.

2. Disclosure Requirements for "Independent Expenditures"

***24** Any entity, regardless of whether it qualifies as a "political committee" under Washington law, must disclose its "independent expenditures" to the PDC if the value of such expenditures totals more than one hundred dollars or cannot reasonably be estimated. WASH. REV.CODE § 42.17.100(2)-(4). An "independent expenditure" is defined as "any expenditure that is made in support of or in opposition to any candidate or ballot proposition" and is not already required to be disclosed under the rules governing political committees. *Id.* § 42.17.100(1). HLW challenges these disclosure requirements for the same reasons it challenges the PAC-style reporting requirements: it argues that "support" and "opposition" are unconstitutionally vague and that the definition as a whole is overbroad because it is not limited to "express advocacy" as applied in *Buckley*. (Mot. 19-21 (Dkt. No. 67).)

The Court has already rejected both of these arguments. Moreover, HLW's challenge is particularly unpersuasive when directed at simple disclosure requirements, which are reviewed under "exacting scrutiny." *See Davis v. FEC*, --- U.S. ----, ----, 128 S.Ct. 2759, 2775, 171 L.Ed.2d 737 (2008); *Buckley*, 424 U.S. at 64. The Court finds it evident that requiring disclosure of independent expenditures is "substantially related" to Washington's compelling interests; indeed, simple disclosure is one of the least restrictive means of furthering the state's interests. *See McConnell*, 540 U.S. at 201 (noting that disclosure requirements "do not prevent anyone from speaking" (internal quotation omitted)).

3. Disclosure Requirements for "Political Advertising"

Washington also imposes special requirements on "political advertising," and HLW argues that the state's definition of this term is vague and overbroad. (*See* Mot. 21-22 (Dkt. No. 67).) "Political advertising" is defined to include "any advertising displays, newspaper ads, billboards, signs, brochures, articles, tabloids, flyers, letters, radio or television presentations, or other means of mass communication, used for the purpose of appealing, directly or indirectly, for votes or for financial or other support or opposition in any election campaign." WASH. REV.CODE § 42.17.020(38).

First, HLW again claims that the terms "support" and "opposition" are vague and overbroad because they could chill "issue advocacy." (Mot. 21-22 (Dkt. No. 67).) This argument is no more persuasive when applied to the definition of "political advertising" than when applied to the definitions of "political committee" or "independent expenditure."

Second, HLW argues that the phrase "directly or indirectly" is vague and overbroad. (*Id.* at 21.) In *AR TLC*, however, the Ninth Circuit had "little trouble" upholding a statute that contained this same term. 441 F.3d at 782-83. In that case, the Court considered Alaska's definition of "electioneering communication," which resembled the federal definition except that it applied when a communication "directly or indirectly identifies a candidate" whereas the federal definition required that a candidate be "clearly" identified. *Id.* The Court explained:

> ***25** The federal definition specifies no method of identification. The Alaska definition specifies that the method may be direct or indirect; however, since the words "direct and indirect" together describe the complete universe of possible methods of identification, the Alaska statute has the actual effect

> of requiring no specific methods of identification, just like the federal definition.

Id. at 783. As in *ARTLC*, the phrase "direct and indirect" neither expands nor contracts the scope of Washington's definition of "political advertising"-instead, it simply "describe[s] the complete universe of possible" appeals. *Id.* Because the phrase does not change the definition's meaning, it cannot, by itself, render the definition vague or overbroad.

Finally, HLW notes, and the state concedes, that the statute does not define the term "mass communication." (Mot. 22 (Dkt. No. 67); Rippie Decl. ¶ 46 (Dkt. No. 47).) The Court acknowledges that the term contains some ambiguity, but this ambiguity provides insufficient grounds to find the definition of "political advertising" unconstitutional. HLW proposes to solicit fundraising through letters and telephone calls and to issue "radio ads." (Compl. ¶ 22-24 (Dkt. No. 1).) The "political advertising" definition explicitly covers "letters" and "radio and television presentations," so the only relevant question to HLW's as-applied challenge is whether its proposed telemarketing solicitation would be considered "any ... other means of mass communication." WASH. REV.CODE § 42.17.020(38). The Court finds that telemarketing fits squarely within any reasonable definition of "mass communication," especially now that telephones are increasingly used both for fundraising and direct political advertising. *See, e.g.*, Carol Costello, *Robocalls flood phone lines in battleground states*, CNN, Oct. 23, 2008, *available at* http://www.cnn.com/2008/POLITICS/10/23/robo.calls/. Moreover, HLW cannot bring a facial challenge on overbreadth grounds unless it demonstrates that the ambiguity in the definition will chill "substantial" amounts of protected speech. *See Virginia v. Hicks*, 539 U.S. 113, 119-20, 123 S.Ct. 2191, 156 L.Ed.2d 148 (2003). HLW makes no attempt to prove that *any* speakers would self-censor their protected speech out of fear that their method of communication might impermissibly be deemed an "other means of mass communication," much less than such a chilling effect would be "substantial ... relative to the scope of the law's plainly legitimate applications." *Id.* Accordingly, the Court finds that HLW has failed to carry its "heavy burden" of proving that the potentially ambiguous "mass communication" term renders the definition of "political advertising" overbroad. *See McConnell*, 540 U.S. at 207.

4. "Ratings, Evaluations, Endorsements and Recommendations"

Finally, HLW challenges the treatment of ratings and endorsements under Washington Administrative Code § 390-16-206, which provides:

> ***26** (1) Any person making a measurable expenditure of funds to communicate a rating, evaluation, endorsement or recommendation for or against a candidate or ballot proposition shall report such expenditure including all costs of preparation and distribution in accordance with [Washington Revised Code] chapter 42.17. However, rating, endorsement or recommendation expenditures governed by the following provisions are not reportable: The news media exemptions provided in [Washington Revised Code §] 42.17.020(15)(b)(iv) and (21)(c), and [Washington Administrative Code §] 390-16-313(2)(b), and the political advertising exemption in [Washington Administrative Code §] 390-05-290.
>
> (2) A candidate or sponsor of a ballot proposition who, or a political committee which, is the subject of the rating, evaluation, endorsement or recommendation shall not be required to report such expenditure as a contribution unless the candidate, sponsor, committee or an agent thereof advises, counsels or otherwise encourages the person to make the expenditure.

Id. The record makes clear that this provision was not intended to create new reporting requirements, but rather to clarify that certain "ratings, evaluations, endorsements, and recommendations" would *not* need to be disclosed to the PDC or reported as contributions by candidates or initiatives being endorsed. (*See* Rippie Decl. ¶ 50 (Dkt. No. 47 at 26).) In particular, ratings and endorsements made without "a measurable expenditure of funds" or made in the form of a news media item, commentary, editorial, etc., need not be disclosed as expenditures or reported as contributions. (*Id.*)

HLW argues that § 390-16-206 is unconstitutional because it "relies on a vague for/against test" and "regulat[es] a vast swath of protected issue advocacy." (Mot. 22-23 (Dkt. No. 67).) Again, the Court notes that "issue advocacy" is not entitled to absolute protection under the First Amendment and can be regulated if the circumstances so justify. Moreover, the provision at issue in this challenge does not create new reporting requirements; instead, it carves out an exception to the existing disclosure requirements in order to preserve the traditional function of the news media and to allow non-journalistic individuals and organizations "to evaluate and rank candidates and ballot measures without reporting so long as they are not paying for

advertisements or otherwise spending funds to communicate" the ranking or evaluation. (Rippie Decl. ¶ 50 (Dkt. No. 47).) In carving out this commendable exception, the state employs language no more vague than the "support" and "oppose" language approved by the Supreme Court in *McConnell*. 540 U.S. at 170 n. 64. In sum, the Court holds that § 390-16-206 does not violate the First Amendment; instead, it is a laudable attempt to *protect* traditional First Amendment interests within Washington State's campaign finance framework.

III. CONCLUSION

***27** For the foregoing reasons, Plaintiff's Motion for a Summary Judgment (Dkt. No. 67) is DENIED.

SO ORDERED.

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